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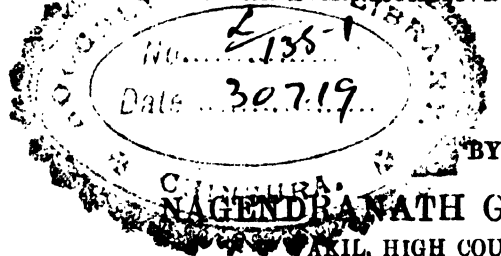




# Tagore Law Lectures, 1918.

## COMPARATIVE ADMINISTRATIVE LAW

WITH SPECIAL REFERENCE TO THE ORGANISATION AND LEGAL  
POSITION OF THE ADMINISTRATIVE AUTHORITIES IN BRITISH INDIA.



"And the Lawyer's profession demands of him something more than the ordinary public service of citizenship. He has a duty to the Law. In the cause of peace and order and human rights against all injustice and wrong, he is the advocate of all men present and to come."—MR. ELIHU ROOT. (*Commencement address before the Yale Law School, New Haven, June 27, 1904.*)



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Calcutta.

BUTTERWORTH & CO., (INDIA), LTD., 6A, HASTINGS ST.

WINNIPEG :

SYDNEY :

BUTTERWORTH & Co. (Canada), Ltd.

BUTTERWORTH & Co. (Australia), Ltd.

LONDON :

BUTTERWORTH & CO., BELL YARD, TEMPLE BAR.

**New Publishers.**

1919.

**Calcutta :**

**PRINTED BY—BHUTHNATH SARKAR.  
AT THE DYNOW PRINTING WORKS,  
205, OLD CHINA BAZAR STREET.**

## PREFACE.

The text of these lectures had been completed before May 1918. Since then, several events of capital importance from the point of view of students of comparative politics, and of Indian students in particular, have taken place. They are, *first*, the publication of the Montague-Chelmsford Report on Indian Constitutional Reform, references to which will be found in numerous footnotes throughout the book (*vide* Index, under heading, Montague-Chelmsford scheme of constitutional reform for India). *Secondly*, the termination of the War involving (as it has done) (i) the destruction (amongst others) of the German and Prussian governments, to a consideration of which a great deal of space had necessarily to be devoted, and which cannot be ignored even now or hereafter in any historic study of comparative politics such as the present lectures profess to be; and (ii) the nearly world-wide upheaval of Labour which the author sincerely hopes will yet, under judicious guidance, suffer itself to be reconciled and regulated. As to the former, the author believes that, as in the case of other historic polities, the constitutional changes in Germany, revolutionary as they now appear to be, will fail immediately to make any deep impression upon the methods of administration—which he expects will remain for many years yet organically one with that which prevailed in the Hohenzollern regime. It may in any case be safely assumed that the new forms of administration which may be expected to arrive in Germany and elsewhere are not likely to take shape within the next decade. The *third* event is the passing through the Legislative Council of the Governor General of India of the first of the two Rowlatt Bills for a term of three years from the expiry of the present Defence of India Act, some emergency provisions whereof the new enactment virtually incorporates in the Statute-book of India on a more permanent footing than that Act. All that need be stated here in its connection is that the bearing of these provisions of the Defence of India Act and other similar legislation on the administrative system has been duly considered in the text.



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- P. 143, para. 19, l. 1, *delete* State
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## BOOK III

# ADJECTIVE ADMINISTRATIVE LAW.



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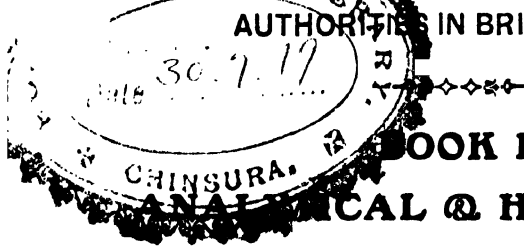
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# Comparative Administrative Law

WITH SPECIAL REFERENCE TO THE ORGANISATION  
AND LEGAL POSITION OF THE ADMINISTRATIVE  
AUTHORITIES IN BRITISH INDIA.



## BOOK I. ANALYTICAL & HISTORICAL.

### LECTURE I. INTRODUCTORY.

*(I)—General Aspects.*

1. Administrative law is a branch of Public or State law. Administration, broadly speaking, is the sum-total of acts by which a State seeks to effectuate its intentions and purposes. When, in so acting, the State is obliged to follow and enforce (more or less) definite rules and principles, there is administrative law.

Administration and administrative law.

2. But a State may not and often need not have to act in accordance with settled rules and principles. There has been and there may be administration without law. Administration without law is not even necessarily bad administration, nor is it invariably the mark of a low order of civilisation (a).

Administration without law.

(a) The broad distinction drawn in the following paragraphs between 'administration without law' and 'administration according to law' and the inclusion within the former of most ancient and some modern polities may appear at first sight to be an overstatement, for it may well be urged that none of these Governments has acted altogether capriciously or fitfully. It has also to be conceded that in proportion as a State, whether ancient or modern, has been able to establish ordered government, it has had in the same proportion to submit to being guided by more or less settled principles of administration. But even these concessions do not detract from my classification, because in the absence of the conditions outlined in the second part of this lecture, the rules and principles which these States may be said to have normally followed in their administration are rules of imperfect obligation only. They are no doubt the germs out of which, under favourable conditions and under the influence of ideas which were foreign to ancient polities, administrative law

3. The Greek City States were administered without law. Rome developed to perfection a system of private law to govern the relations of subjects amongst themselves. But neither during the Republic nor in the palmy days of the Empire was there anything answering the description of administrative law. Things were not very different in Hindu India (a). In the Islamic State, as in Imperial Rome, the Sovereign ruled by a hierarchy of officials who were responsible to no one but to the Sovereign (b). French administration knew hardly any restraint of law in the Royal regime and French administrative law as we know it now is, to a certain extent, a by-product of Napoleonic autocracy. In Germany of the Holy Roman Empire, there was hardly any unity of administration, not to speak of administration according to law. In Prussia, before the Stein-Hardenburg reforms of the early 19th century, the administration was bureaucratic to a degree. The phenomenal rise of Japan by, as it were, one bound from medieval to modern conditions is a triumph of administration, but not only has that administration been throughout autocratic and opportunist, it is more than doubtful whether the Meiji era would have accomplished a tithe of its triumphs, had it been less untrammelled by law.

Original  
home of ad-  
mini-strative  
law, England.

4. Administrative law is indeed a very late fruit of history. It made its first appearance in a rudimentary form in England, under the Angevin kings. It took definite shape only after the Revolution of 1688, when the theoretical bases underlying any system of administrative law were firmly outlined in Locke's Treatises on Government. Partly through Montesquieu and partly through Rousseau, the knowledge of these factors of lawful administration—which are also the

properly so called has evolved, and I shall have occasion to trace this process in subsequent lectures. But to call them rules of "administrative law" would be a misapplication of language. That designation should be reserved for rules, whether of law or usage, framed with reference to a more or less consciously realised conception of the obligation of a Government to act according to law, as well in its relations to its subjects as in the delegation of its powers to its agents. See Lecture VI *infra*, paras. 1-9.

(a) Pramatha Nath Banerjee's Public Administration in Ancient India, Ch. XII.

(b) D. S. Margoliouth's Mahomedanism (Home University Library) pp. 97-99

foundations of all forms of constitutional government—passed into Continental Europe. The English colonists in America after recovering their freedom proceeded to frame their Government out of these same elements. They have spread into the Colonies and Dependencies of the British Empire. They have been carried into British India and have even found their way into several of the Feudatory States. To England is due the credit of being the original home of administration according to law (a).

5. And yet it is not claimed that all the systems of administrative law in force to-day all over the world are but variations of one single type. The seeds of administrative law, though essentially the same, falling on different soils, have developed on different lines, and have produced well-distinguishable types,

But the English is not the only type of administrative law.

6. But though administration according to law originated and took shape in England, owing to circumstances peculiar to England, chief amongst which is the fact that in that country the same tribunal administers both private and public law and by very nearly the same procedure, administrative law in England was never differentiated from private law so as to suggest or make necessary a separate study and treatment of this branch of the law (b). It was the establishment in France of separate tribunals for the administration of public law, acting on principles quite distinct from, if not opposed to, those which govern the administration of justice as between subject and subject, that first drew attention to administrative law as a subject of special study. So it was that administrative law first became a subject of scientific study not in its original home but on the Continent of Europe.

Administrative law not differentiated in England from private law and not yet made a subject of special study.

Otherwise on the Continent of Europe.

7. The literature of administrative law on the Continent of Europe is unusually rich. In contrast English literature on administrative law may be said to be wholly wanting. Administration rather than the law of the administration has been the subject of study with English and American writers. Practi-

English and American literature on administrative law.

(a) Cf. Brissaud, *History of French Public Law*, p. 332.

(b) Dicey, *The Law of the Constitution*, Sixth Edition, Ch. XII; Goodnow, *Comparative Administrative Law*, Vol. 1, p. 6; Lowell, *Governments and Parties in Continental Europe*, Vol. 1, pp. 55-56.



tioners' handbooks on special branches of administrative law exist in both countries, but with one rare exception, administrative law as a whole has not formed the subject of systematic study by any English or American writer : that one exception is Professor Goodnow of the Columbia University. Professor Goodnow has written a valuable text-book on the Principles of the Administrative Law of the United States and another more ambitious work on Comparative Administrative Law (a). But the scope of this book is both wider and narrower than is indicated by its title, for a large part of it is taken up by a comparative treatment of the administrative systems of four countries—England, the United States, France and Germany. The somewhat elaborate treatment of the administrative organisation of the four countries contained in the book was justified at the time by the absence in the English language of books dealing with administrative systems—an absence since made good by the excellent volumes of Professor A. Lawrence Lowell on "Governments and Parties in Continental Europe" and "The Government of England", Mr. Dodd's "Modern Constitutions" and Mr. Ogg's "Governments of Europe" (b) and several other less comprehensive treatises. Professor Goodnow's book though far too elaborate in this respect is incomplete in another, in that it does not deal with the bases of administrative law as furnished by political science and constitutional law and wholly overlooks that which interests Indian readers most, *viz.* colonial administration. The former ground, in his view, had been so completely and satisfactorily traversed by Professor Burgess in his excellent treatise on Political Science and Constitutional Law that he felt justified in taking its results for granted for the purpose of his own researches in the allied field of Comparative Administrative Law.

Scope of the  
present  
lectures.

8. The plan of the present lectures will be to deal with the administrative organisation of the several countries selected for treatment, except India, with all possible brevity and of India also not too fully—for there are excellent works on

(a) The latter book appears to have been written first, the former partly repeating and partly elaborating the portions of the larger work which dealt with the administrative law of the United States.

(b) Messrs Lowell, Dodd & Ogg are like Mr. Goodnow American writers.

the subject (a) which are widely read—and at the same time] to devote as much space as is necessary to a consideration of the theoretical and constitutional implications underlying all administrative law. A close study of these has further convinced me that it will be highly useful (as preparatory to a study of phenomena which though widely scattered are manifestations of the same principles) to trace the history of the growth of the ideas which have contributed to the making of modern administrative law.

9. I have sought to establish that administration according to law is by no means essential to the efficient performance by the State of its appointed work. From what I have said before it will also have appeared that until quite recently administration according to law has been in the history of States the exception rather than the rule. I desire here, at the outset, to lay stress on another fact, *viz*: that even in those countries which have evolved a system of administrative law, the State has nowhere bound itself to follow fixed legal rules in every department of its activities and in all circumstances. A State cannot permit itself to be reduced into an automaton consistently with its own safety and the best interests of the individuals committed to its charge. The familiar doctrine that the State, being the source of all law, cannot subject itself to laws except by way of self-limitation and that therefore the State must always remain free to override these limitations whenever the supposed exigencies of public life may demand it, is at the bottom based upon a natural apprehension that undue limitation of the State's powers will not only cripple its capacity for doing good, it may even in times of crisis prove destructive of the State itself (b). The State must be free in the same sense as all well-conditioned individuals within it are free. The limitations upon its freedom must be rational. The tendency in modern democratic

Is administrative law a limitation of the Sovereignty of the State.

Danger of extreme legalism in administration.

The State like the individual a free personality, Limitation, conceived as rational.

(a) Notably, Ilbert's *Government of India*, Chesney's *Indian Polity*, Strachey's *India: Its Administration and Progress*, and Rangaswami Iyengar's *The Indian Constitution*. Holderness's *Peoples and Problems of India* (in the Home University Library), small as it is, cannot well be omitted from this list.

(b) The German jurist Jhering is the classical exponent of the doctrine of the auto-limitation of the State. It has been worked up more fully by Jellinek. See Ch. VII of M. Leon Duguit's "The Law and the State" in 31 *Harvard Law Review*, November 1917.

States is indeed towards increasing the powers of the State. The growing complexities of modern life in which the conflict of local and sectional interests within the State appears to be assuming larger and larger proportions seem to call rather for an increase of power in the controlling authority than for its diminution. The aim of a sound system of administrative law should be not to cripple the powers of the State but to provide effective guarantees that these will be wisely exercised.

10. On the other hand, the evils of unlimited rule are writ so large on the face of history that to leave Leviathan unchained may prove equally destructive not only of the best interests of individual subjects, but even of the State itself. The business of Government must be carried on by human agencies and there are few men indeed who can be trusted to wield unlimited power over their fellow-men. A sound body of administrative law must therefore be a compromise between the claims of extreme autocracy on the one hand and extreme legalism on the other.

Evils of unlimited rule. Powers of agents through whom Government must work must be limited by law.

11. For a just comprehension of the purpose and functions of administrative law, I consider it therefore of the highest importance to mark off in outline, however general, the fields of State activity where administrative law can freely operate, from those where, strictly applied, it may do harm, and within the former, the limits beyond which the limitations of law ought not to go. To facilitate this enquiry, however, it will be necessary to examine the structure of the State and the organs by which it performs its work, confining my examination (it need hardly be said) to those States only which have evolved some form of administrative law.

Limits of the operation of administrative law.

The State at work.

12. The differentiation in structure in these States which most obviously meets the eye (and which so far as these States are concerned is fundamental) is that which is found in the separation of the Executive, Judicial and Legislative organs of the State. This differentiation of structure, I hasten to state, is also found in varying degrees of incompleteness in States which do not possess or have not possessed any system of administrative law, and nowhere has the separation of functions attained a point where each works wholly independently of the other. But to make administrative law at all possible, the progress made towards differentiation must have

Organs of the State : The Executive, the Judiciary and the Legislature.

been such as to enable the judicial and legislative organs of the State to exercise over the executive a degree of control which makes it habitually observe the law. It is the existence of this control that differentiates States possessed of administrative law from others not so possessed. This differentiation of structure came into being everywhere originally to serve the very natural purpose of a division of labour in the discharge of political functions, it being obviously inconvenient, if not impossible, in any but the most rudimentary forms of State organisation to entrust the performance of all these varied functions in the same men or body of men. But even where it has made the greatest progress, this division of labour cannot imply (and never did, except in the minds of political doctrinaires) either mutual exclusion or want of co-operation, any more than the differentiation of organs in the human body should imply mutual exclusion or absence of co-operation. The fact, however, that there has been a differentiation makes it obviously inconvenient and even injudicious for one organ to usurp the functions of the other. The differentiation of organs, moreover, does not in the State, any more than in the human body, exclude the occupation by one of them of a position of relative superiority or even predominance.

True view of their inter-relation. A biological analogy.

13. So viewed, the judicial and the legislative organs are organs of conservation whilst it is the executive through which mainly the State seeks to realise its ends. The original purpose of courts of law when they began to assume a distinct organisation was no doubt to secure cohesion within the community by composing the disputes of its members in accordance with customary laws which the courts had to 'find' and not 'make.' The original purpose again of what has now come to be the legislature was without doubt to secure deliberation in arriving at communal decisions of an executive character, but that laws could be changed at pleasure even by sovereign assemblies was altogether foreign to such political ideas as may have existed in ancient communities. The executive in the beginning would no doubt give effect to communal decisions as administrative resolutions but not as laws. There could thus in the beginning be no notion of laws being made to bind the executive, or of the State being impleaded in disputes between it and a subject before the courts of law

The nature of the Judicial and the Legislative organs. They are conserving but not working agencies.

Their control  
over the Executive in  
modern  
States,

with a view to the enforcement of those laws. And yet it is a fact that in the constitutions of all the countries whose administrative law I shall examine will be found provisions enabling the legislature (within limits) (a) to regulate the actions of Government and government officials by laws and not merely by administrative resolutions. In all these countries again the acts of executive are (also within limits) subject to review by the judiciary (whether of the ordinary courts as in England or of special administrative courts as on the Continent). In fact, "administration according to law" would lose its significance if there were not organs to impose the law on the executive and if there were not courts of law to apply it. The subjection of the executive (within limits) to laws passed by the legislature and the obligation of the executive (also within limits) to submit its differences with individual subjects to the adjudication of courts of law represent the compromise of which I have spoken as the foundation of all administrative law. The so-called "separation of powers" is really the machinery by which administration according to law has been made real in the States under consideration (b). The theoretical implications which underlie it and the historical causes which have led to it will be considered later.

They are organs of the State, not of the Executive Government which itself is a co-related organ of the State.

The Constitution.

Limits of Judicial and Legislative control over the Executive Government.

14. Though, therefore, it is usual and undoubtedly correct to speak of the legislative and judicial organs as organs of the Sovereign power, they cannot be regarded as organs of the executive. The Sovereign power, properly speaking, is the power which lies behind all these organs. Between the Sovereign and these is the Constitution which determines their respective powers and functions, the mode in which one or more of them may control the action of the other or others and the mode also in which their co-operation may be secured. On the other hand, in no country is the executive absolutely subjected to the legislature or the judiciary. In some of the States I shall examine, it may appear at first sight as if the legislature was the Sovereign executive. But in point of fact this is not so. Even in England, where the Legis-

(a) The competence of some legislatures, e.g., of the British Parliament, is considered to be unlimited. The statement in the text is therefore true only in a general way. See *infra*, Lecture XXIV.

(b) See Lecture IV. *infra*.

lature wields the largest measure of authority, the participation of the head of the executive is necessary to validate its laws, and there are spheres of action over which (subject to criticism in the legislature) the executive is virtually supreme, whilst even outside these spheres it is not the habit of the Legislature to interfere directly with the ordinary work of administration. Where the legislature (as in France) oversteps these limits, administration, and good government generally, suffer (a). And even in England and the United States, where the judiciary is the least dependent on the executive, and enjoys the highest degree of prestige, there are acts of the administration which the judicial tribunals will refuse to review. The laws of all these countries, moreover, provide for contingencies in which, under stress of serious political danger, the executive may draw into its hands provisionally all the powers of the State untrammelled by laws and unchecked by tribunals. The executive, therefore, even in States where there has been a "separation of powers," is properly and pre eminently styled "the Government". The word "Government" in these lectures will be used ordinarily to mean the "Executive Government". (b)

Powers of the Executive government in emergencies.

'Government'

15. Examining now the several fields of activity which concern the Government only (as distinguished from the State) they may be classified under five heads : 1. Foreign affairs ; 2. Military affairs ; 3. Judicial affairs, in so far as this concerns the establishment of courts and the appointment and removal of judges ; 4. Finance ; and 5. Internal affairs which would include all the varied forms of police and socialistic work which the Government performs through its agents or through local bodies possessing varied degrees of delegated authority.

Fields of Governmental activity.

(a) Lowell, "The Government of England," Vol. I. Chap. XVIII, and the same author's "Governments & Parties in Continental Europe", Vol. I pp, 111—145.

(b) I should have liked to reserve the term "State" to signify the Sovereign power behind the constitution. But the use of the word to signify what I have called "the Government" is so very common that it would be affectation not to use the two terms interchangeably, if only to avoid repetition. I am sure I shall not be misunderstood when I use the word "State" to mean the "Sovereign power" or any other of the many things for which it stands in the English language.

Scope of administrative law in each of them ; 1 & 2. In Foreign and Military affairs—International and Military law.

3. In Judicial affairs—Independence of judges.

4. In Financial affairs—Legislative control.

5. In Internal affairs, the field *par excellence* of administrative law.

16. It is obvious that the Government must be given a fairly free hand in dealing with the first two classes of affairs. Not that the acts of the Government in relation to these must needs be lawless. Neither International law (which applies to the first) nor Military law (which applies to the second) is strictly speaking law (a). But they represent a body of rules and principles which in normal times at least are invariably followed. The growth of these institutions in modern times is strongly indicative of the growing anxiety of Governments to avoid acting capriciously even when constitutionally free to do so and of their growing regard for law. But in these two fields, the Government must, as a rule, be free from direct legislative and all judicial control, at least of the ordinary kind. The proper function of the legislature in these fields is criticism. With regard to Judicial affairs, the judicial control over the administration which, as already pointed out, is a condition of administration according to law, cannot be made a reality unless the power of establishing courts of law and of appointment and removal of judges which must be entrusted to the executive (for the sake at least of unity of administration) is to a substantial degree regulated by law (b). Both history and a consideration of existing systems of administration show that the quality of the judicial control varies with the degree of independence enjoyed by the judiciary.

17. The control over Financial administration, where it exists, is, in the systems under consideration, mainly legislative and therefore a proper subject for consideration in a treatment of constitutional law. In so far as the financial measures of a Government are embodied in statutes, the financial administration of the country must be subject to law. (c).

18. Internal affairs are *par excellence* the field of operation of administrative law. It is here that the Government

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(a) Like most general statements, this, so far as military law is concerned, is true only approximately. See Lecture XIX *infra*

(b) The State Judges in the United States of America are in most of the States elected. The Federal Judiciary however are appointed. The tendency at the present day is to take away the power of removal, in the case at least of the highest Judiciary, from the Executive. See Lecture XVI *infra*

(c) See Lecture XXIV *infra*.

enters into the most intimate relations with its subjects. In many of these relations the position of the Government is not easily distinguishable from that of any private individual

19. In several systems, Government in such relations is in point of fact treated as a juristic person, and it was no doubt with reference to such relations that Professor Maitland gave characteristic expression to the prevailing opinion in England (not yet unfortunately authoritatively established): "It is a wholesome sight to see the Crown sued and answering for its torts" (a). Even outside these relations, the Government in pursuing public ends may come into conflict with individual rights and interests. Here, too, Government is expected not to interfere with private rights and interests by over-stepping the bounds of law. The activities of the administration here too must in the interest of good government be regulated by law.

(i) Government as Fiscus.

(ii) as Government.

20. Except to point out in what fields of Governmental activity administrative law can most usefully operate, it may be stated that a classification of the departments of administration or of the directions of its activity within these departments is of no direct value in any general treatment of administrative law, for that law does not assume a different character according as its operation is directed to one field of Governmental activity or to another. General administrative law is concerned rather with the instruments and organs with which and the modes according to which Government works than with the works themselves. It is chiefly concerned with the manner in which the powers of Government are distributed and co-ordinated, the authorities amongst whom they are distributed, the limits to the exercise by each of its respective powers, the duties which these powers imply, the sanctions by which the performance of these duties may be secured and the transgression of the limits imposed by law may be prevented or penalised. It will protect officials and public authorities in the just discharge of their duties and lay down, in the public interest, rules for their appointment and removal. It will determine the tenure under which public

Operation of administrative law, so far as it goes, similar in all departments of Governmental activity.

Contents of administrative law.

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(a) Maitland, Article in 17 Law Quarterly Review 131 at p. 142 entitled "The Crown as Corporation", reprinted in his "Collected Papers", iii 244. See Lecture XIII *infra*.



offices shall be held and regulate the relations of subordinate and superior officials. Where Government relies on autonomous local agencies for carrying out its purposes, administrative law will determine the constitution and functions of these bodies.

Administra-  
tive law as  
an aid to  
good govern-  
ment.

21. As I said at the outset, administration without law need not necessarily mean bad government, nor is administration in accordance with law necessarily good government. But the importance of administrative law as an aid to good government must be apparent. It may seem even as if at a certain stage of State-development, administration according to law is a necessary concomitant of good government. No State which claims to be considered civilised can afford to remain to-day a mere "police" State, and it is difficult to conceive how with a full sense of its responsibilities a State of the first rank can to-day do without some system of administrative law. In constitutional Governments, it is administrative law which works out in practice the promises of the constitution. It can hardly be an accident that the first part of the 19th Century which in Europe and America has been the era of constitution building should have been followed by an era of administrative reforms carried out by legislation.

Constitu-  
tional  
Government  
and Adminis-  
trative law.

"Adminis-  
tration" im-  
plies a  
"trust".

22. I shall conclude this preliminary survey of the subject by drawing attention to the sense conveyed by the very name by which this law is known. Administration implies the performance of a trust. It needs no appeal to philosophy to persuade one to-day to admit that all civilised Governments must constitute themselves into (and indeed most modern Governments are agreed that they are) holders of a trust, that they are trustees for the whole people and not for any particular class or community, and that the ultimate goal of all Governments and the ultimate purpose of all Governmental activities is the welfare of the people as a whole. Administrative law, rightly viewed, is the body of rules and principles by which Governments seek to discharge this trust with efficiency and yet without avoidable injury to individual rights and interests. A sound body of administrative law can grow only on a double foundation of the recognition by the State of the worth of each individual citizen for his own sake and of a corresponding recognition by the citizens as a whole of the indispensability in their own interest of a

Nature of  
the trust.

living, working, and efficiently organised Government, animated by a single desire to fulfil its trust.

(II) *Theoretical Implications.*

23. I have drawn prominent attention to the fact that every State does not possess a system of administrative law, and that in fact it is found only in certain exceptional types of States. This fact undoubtedly points to the existence of conditions which favour the development of administrative law and others which do not. The conditions which favour the growth of administrative law and those which retard it may be discovered by analysis and comparison of the nature and working of the several forms of Government, those which possess a body of administrative law as well as those which do not. But the causes which have led to the establishment of a system of administrative law in any particular instance cannot be found by analysis. For these, one must look into history.

Conditions  
and Causes  
of adminis-  
tration  
according to  
law.

Conditions.

24. As a result of such analysis it may, I think, be laid down with some amount of confidence that one of the essential conditions favouring the development of administration according to law is the separation of the State from Government.

I.  
Separation  
of State from  
Government.

25. Where the State and Government are identical, be they one (Monarchy), the few (Oligarchy) or the many (Democracy), there is no power on earth to hold the latter to its responsibilities, no question of its being made to follow the law. Such Governments must necessarily be absolute; checked if at all only by moral scruples and the fear of revolution. Such Governments may, not inconceivably, be animated by humanitarian, even philanthropic, motives. But even in seeking to do good its methods will be just as arbitrary as when seeking to do evil. Instances of this type of Government are to be found equally in the Greek City States and in Imperial Rome—in France during the Revolution as in Modern Russia (a).

Identity of  
the two leads  
to absolutism.

26. When Aristotle defined citizenship as the capacity of being ruler and ruled in turn, he stated in general terms a fact common to all Greek City States—whether ruled by one, the few or the many. Even where the Government was a Government of the many, it was possible in those States for

Absolutism  
in Greek  
City States.

(a) This was written before the Revolution of March 1917.

In Imperial  
Rome.

the entire body of citizens to participate actively in the work of administration. The assembly of the citizens in the most democratic of Greek States, Athens, ordered the administration in its minutest details and held the officials accountable directly to itself. It never had any need to follow legally fixed rules and principles in administration. "The Greek States," says Mahaffy, "seldom interfered with the citizens in the way of Police regulations, but when it did so it interfered as a master would with his slave." (a) The constitution of Imperial Rome, though widely different, showed the same identity of State and Government—the Emperor in his own person being both the one and the other. Of Hadrian, it has been unctuously recorded by a modern historian (b) that he was "one of the few representatives in antiquity of the modern principle that the Prince is the first servant of the State". But it was Hadrian who organized and perfected the most bureaucratic civil service known to history and it was his zeal for good government that led Imperial Rome to take the first step towards bringing the free city municipalities of the provinces under Imperial tutelage. The Roman Emperor in fact ruled a vast Empire with the assistance of a highly centralised and efficient bureaucracy somewhat on the same plan on which a Roman noble ruled his household of domestics and dependents by the aid of a highly disciplined body of slaves. "A relentless system of imperial administration which marshalled citizens as though they were soldiers and treated all classes as the fitting instruments of official life and regarded the subject as existing for the Empire rather than the Empire for the subject" was hardly the kind of soil on which administrative law could take root and flourish (c).

II.  
Recognition  
that Govern-  
ment is not  
an end in it-  
self, but a  
means, the  
welfare of  
the subjects  
being the  
end.

27. The second condition favouring the growth of administrative law, which I now proceed to consider, is often in a great measure bound up with, though not necessarily involved in, the first. It is the recognition by Government of each individual citizen as of value for his own sake and not merely as an instrument of Government, and of the

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(a) Mahaffy, *Greek Antiquities*, pp. 88-89.

(b) Dr. Julius Koch, *Roman History*, translated from the German by Lionel D. Barnett, Fourth Edition, 1909, p. 130.

(c) See Lecture III (iv) *infra*.

Government itself as a means rather than as an end. The ancient omnipotent Governments, says Woodrow Wilson, knew nothing of individual rights as contrasted with the rights of the State (a). 'The citizens' even in highly democratic Athens looked for protection from high-handed acts of officials to the administrative control which they might exercise in the popular assembly. But the right of the assembly itself, which was at the head of the administration, to order about citizens and officials alike, could be questioned only by an act of rebellion. Democracy in Greek States, in practical application, always meant the tyranny of the majority—in plain language, mob-rule. Moreover, 'citizens' in Greek States formed but a small minority of the population of whom the majority, consisting of slaves and mechanics, worked and slaved to provide leisure to the privileged few to pursue the arts of Government. The unenfranchised majority and the enfranchised minority were alike bound to follow the behests of the enfranchised majority, however capricious (b).

Contrary  
view govern-  
ed in ancient  
polities.

In Greek  
City States.

28. Slave economy sustained the Roman State also, though the slave in the Empire was not without rights. But though slave and freeman alike enjoyed the protection of the law, when the differences were only between subject and subject, there was no sphere of the individual's life which was sacred from interference in the interest of the State. Marshallled as a soldier when submissive, relentlessly persecuted when (as in the case of the early Christian) he failed to fall in with the views of the Government, what Roman citizen could dream of invoking the protection of law against the State itself?

In the Roman  
Empire.

29. The idea of individual citizens having a sphere of rights with which even the State might not lightly interfere, is one of the few ideas which modern Europe does not owe to Ancient Greece or Rome. The individual as a political and moral entity, possessing rights in some matters paramount (in normal times at least) to the State is curiously enough a by-product of that much maligned Medieval institution, Feudalism. It was its death-bed legacy to modern Europe.

The idea  
that the sub-  
ject has  
legally enfor-  
cible rights  
against the  
State is de-  
rived from  
Feudalism.

(a) Woodrow Wilson. *The State*, p. 532.

(b) See Lecture III (i) *infra*.

Feudalism,  
its charac-  
teristics.

30. "In the really Feudal centuries", say Messrs. Pollock and Maitland, "men could make the relation between King and subject look like the outcome of agreement; the law of contract threatened to swallow up all public law. These were the golden days of 'free' if formal contract" (f). In the strictly Feudal polity, the King was but one of several units of society held together by the bonds of Feudal engagements. For considerations of service, the King parted with portions of his land and jurisdiction, and, save for such shreds and patches of the traditional Imperial prerogative as with the connivance of the Church he was able to gather round his person, he could be held (in theory at least) to the terms of his engagements as strictly as the meanest villein in the kingdom.

(f), Pollock & Maitland, *History of English Law*, 2nd, Edn, Vol. I, pp. 232—233. The statement in the quotation and in the paragraph which preceded it, seems, at first sight, to be opposed to the familiar observation that in the Society of the Middle Ages, the group was the unit and not, as is the case now, the individual citizen. Even now, individuals combine in associations to protect their common interests, e. g., trade unions, manufacturer's associations, etc., whenever the rights of individuals having common interests are, or are believed to be, not sufficiently protected by State authority. In Feudal Society, at the same time that the rights of every one were defined by law, effective protection of these rights was greatly wanting in the absence of a strong central authority to enforce it. Hence the tendency, which history shows is older than Feudalism, towards formation of groups, guilds and classes. The statement often met with in text-books that in Feudal Society the group was the unit is misleading, if not positively incorrect. The statement quoted (divorced from its context) does, however, need correction in so far as it may suggest that the rules of law which governed the relations of lord and chief, in the Feudal scheme, were determined entirely by contract. These were, in their inception, customary rules not modifiable by the wills of the parties and the Common law of England to a large extent remains unalterable by agreement up to the present day. But the Feudal relationship itself was created by contract. The point, however, which requires emphasis in the present context is that every individual from the King to the villein had a place in a system in which the relations between one individual and another (including the King) were regulated by law. The Roman Imperial idea of the State being above law was foreign to the Feudal scheme. That Feudal Society was based primarily on contract is borne out by the fact otherwise unintelligible that no member of a Feudal Assembly originally considered himself bound by a decision of the majority to which he had not personally assented. In fact, the dissent of a single member was enough to wreck a proposal. For a description of the operation of this "*liberum veto*" in Poland, see Prof. Phillips' monograph on Poland in the Home University Library, Ch. IV, and, in Aragon, Mackinnon's *History of Modern Liberty*, Vol. I, pp. 255-256. See also Brissaud, *History of French Public Law*, p. 362.

31. The central idea of Feudalism was the subjection of the ruling body (grants of land, it must be remembered, always carried with them grants of jurisdiction) equally with the ruled to law (a). Its defects lay in the extreme points to which this idea could be carried, to the destruction indeed of all centralised authority, the very authority which was needed to put the idea into practice.

Why Feudalism by itself failed to evolve a system of ordered administration.

32. "Under Feudalism", writes Davis, "the powers of the Crown, executive, judicial and administrative, are often granted away to be held by the same tenure as the fiefs over which they are exercised. And thus it created the worst form of civil service that we can conceive, a corps of hereditary officials who can only be checked or removed with extreme difficulty, who render no account of the sums which they collect under the names of fines or dues, who are seldom educated to the point of realising that even in their private interest honesty is the best policy. If this system had developed to its logical conclusion, if the principles of Feudal government had not been mitigated by revolt from below and interested tyranny from above, the only possible end would have been a state of particularism and anarchy compared with which the Germany of the fifteenth century or the Italy of the eighteenth might be called an earthly paradise" (b).

33. A strictly Feudal polity, it is apparent, was impossible, for it bore within it the seeds of anarchy, the only antidote to which was a strong and centralised monarchy. How, in Western Europe, the royal power ultimately triumphed over the self-interested and self-seeking Feudal nobility is known to students of history. As will be shown later, the diverging ways in which this conquest was accomplished in England and the Continental countries had important consequences in determining the character of the administration and the principles according to which it was to work in each of these countries. In each case, however, the conquest was achieved with the aid of the Commonalty, and the important point to note in the present connection is the fact that though Feudal

Transition from Feudal Kingships of the Middle Ages to the Centralized Monarchies of later times.

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(a) That the principle of Feudalism was a principle of liberty is testified to by M. Brissaud. *History of French Public Law*, p. 214.

(b) H. W. C. Davis, *Medieval Europe* (Home University Library), pp. 93-94. See also Brissaud, *History of French Public Law*, p. 280.

The Feudal principle of the subjection of the King to law survives and expands into the doctrine of Social Compact.

polity, represented as it was by dismemberment of territorial possession and jurisdiction, passed away, the idea of jurisdiction by contract remained and indeed was extended and adapted itself to the altered circumstances. The King according to the new idea must now be supposed to hold office upon a contract, not with his tenants-in-chief only, but with the entire population. Occam, to mention the earliest apologist of the new monarchy, derived his sovereignty from the people (a). It is a mistake to suppose that the "Social Compact" theory of government which exercised such a strong and universal hold upon the minds of all classes of writers from the 13th to the 18th centuries (b) was the product entirely of philosophical speculation. It represented a mode of thought which was habitual to the people of Medieval Europe.

Further developments. Progress from the idea of sovereignty derived from the people to that of sovereignty of the people.

34. It was hardly to be expected that the new Monarchy would readily acquiesce in this interpretation of the foundations of its new-found authority. The struggle between the King and his recent allies broke out first in England. Whilst the King claimed to rule by *jure divino*, there appeared extreme sections of the people who would not admit even the delegated sovereignty of the King (c), thus foreshadowing doctrines which a century later were to set Europe ablaze. The revolutions of 1649 and 1688 in England destroyed forever the royal pretensions to govern by divine prerogative but they did not, fortunately for that country, destroy monar-

(a) The new theory of sovereignty derived support from the traditional account of the establishment of the Principate in Rome—which, though a military usurpation in fact, was passed on as an act of perpetual delegation of authority by the Sovereign people to the military commander.

(b) The doctrine, it should be remarked, was accepted and utilised by supporters of absolutism (Hobbes and Rousseau) equally with those who argued for a limitation of Sovereign power (Locke, Madison and Hamilton). The doctrine of Social Compact has been rejected as history, but has been reinstated in theory as a "logical necessity". I am not sure I understand what is meant by this expression, unless it merely amounts to a philosophical way of expressing the idea of its "utility". In the above passage I have merely sought to explain its wide prevalence in Medieval thought, not confined by any means to learned men only. See Brissaud, *History of French Public Law*, p. 538, for a typical modern estimate of the theory.

(c) Gooch, *Political Thought in England from Bacon to Halifax* (Home University Library) pp. 81—84.

chy. They established as a historical fact what Occam (1270-1347) and Althusius (1557-1638) had asserted as a political theory (a) that the people were sovereign and the authority of Governments was authority which the people had entrusted to them under a "contract of sovereignty" which made it incumbent on all Governments to use that authority, never in an absolute manner, but always limited by consideration for the people. For the first time in history, the executive of a nation became "administrators" for and trustees of the people in fact as well as in theory.

35. The doctrine of the sovereignty of the people reached its high-water mark in France at the end of the 18th century. In this country, it refused all compromises with the hereditary monarchy which it proceeded to destroy root and branch (b). This drastic treatment of the traditional executive cost France a century of travail to replace it by a really effective constitutional executive without which administration is nought. But neither France, nor the rest of Europe which learned so much (positively as well as negatively) from the Revolution, is likely to forget one lesson, the teaching of which affords the only extenuation of the orgy of blood and terror through which she passed. That was the lesson of equality in moral value of all men in any scheme of administration. Far away from the scene of conflict and just when affairs in France were approaching a crisis, the Philosopher of the age, Kant, summed up the new teaching (which was as much ethical as political) in a sentence which is now accepted as axiomatic: "Act so that

(a) The name of Marsilius (Marsiglio) of Padua (who died in 1328) is usually coupled with that of Occam as the first advocates of the derivative sovereignty of the King. But Marsilius had in fact gone much further, having affirmed the authority of the Sovereign people to punish and even to depose a King. As Mr. Dunning has pointed out, Marsilius's views were in many respects out of all relation to the current of Medieval thought (*History of Political Theories, Ancient and Modern*, p. 238). He clearly affirms the plenary authority of the Sovereign assembly to control and punish the executive, an idea derived from Ancient and not Feudal conceptions of Government. That idea was, at this time, in vigorous operation in only one State, *viz.*: Venice, and the association of Padua with Venice was too close for an inhabitant of the latter place not to be influenced by its institutions. Sovereignty, according to Marsilius, was no doubt delegated, but it was not derived from a contract.

(b) An experiment now being tried in China and Russia.



you treat humanity, whether in your own person, or in the person of another, ever as an end, never merely as a means" (a.)

Sovereignty of the people not universally admitted, but that Government is trustee for the people, is.

36. Not in all the systems of government of the present day are the people acknowledged to be sovereign. But each one of them is pledged to seek solely and exclusively the welfare of its own people, and justifies its existence only as being indispensable to the attainment of this end (b). This condition, among others, favouring the growth of a sound body of administrative law is fulfilled in each of them.

III  
Unity of administration.

37. Any one who has followed the discussion so far will have no difficulty in surmising what the third most essential condition of good administration must be. This is unity of administration. This unity must not be a matter of reasoning or remote inference. It must exist in fact and be embodied in a living organ of Government co-ordinating and where necessary controlling the entire system. Without such a visible unity there cannot be that pervasive sense of responsibility in officials and non-officials alike which is of the essence of good government. This condition is indeed much more fundamental than the others, for without it not only can there be no administrative law, but no ordered administration of any kind. This is why the executive whilst allowing itself (within limits) to be bound by law and (within limits again) to be judged by the judiciary must, at the same time, retain in its hands large reserves of power capable of expansion, in appropriate circumstances, even at the expense of the other two organs of the State. (c)

Absence of it destructive of ordered administration of any kind.

Poland.

38. The two most apposite historical instances of the failure of administration, through the absence of this factor, are Republican Rome and Poland. The latter is the only country in Europe where Feudalism appears to have worked itself out in the completest fashion. What the success of Feudalism might mean to the administration has already been

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(a) The oracle of Konigsberg was as uncompromising in his alliance of State absolutism in his "Philosophy of Law" as he was of individualism in his "Critique of the Practical Reason". For an examination of Kant's views as exhibited in his "Philosophy of Law", see M. Leon Duguit's article on "The Law and the State", Ch. III, in 31 Harvard Law Review p. 40.

(b) The Indian reader need hardly be reminded in this connection of the language of the Queen's proclamation of 1858.

(c) For a further discussion of this topic, see Lecture XXIV *infra*.

indicated (a). A few words will suffice to sketch the condition of things in Rome under the Republic.

39. Rome steps into history as a highly centralised monarchy. The King (*Rex*) was the regulator of all things human and divine. The Republic continued the royal *imperium*, vesting it with some small limitations in the two Consuls. But that these large powers might not be abused as they had been by the Kings, each Consul was given power to veto the other. Later on the struggle between the classes led to the *imperium* being further broken up and distributed amongst a number of officials with no single authority to be responsible to. The deference which the Magistrates habitually paid to the Senate, the standing council of retired officials (which constitutionally was an advising body only), secured unity of action in wars and foreign relations. But its partisan constitution unfitted it for the exercise of supreme authority in administration within the State and the arrogation by it of such authority was keenly resented. But the most disturbing factor in the organisation was the Tribunate. It was organised as a State within a State, and the vetoing power of the Tribunes which was capable of being most capriciously exercised was destructive of all unity of administration (b). The Roman assembly did not exercise administrative control in the way the Greek assemblies did (c). In this state of affairs there could, it has been truly observed, be no true theory of responsibility in the Roman Magistracy (d).

Republican  
Rome.

Disorganising  
effect of the  
*intercessio*  
and the Tri-  
bunician  
*obtestatio*.

(a) The Kingdom of Palestine founded by Feudal crusaders appears to be another instance. Brissaud, *History of French Public Law*, p. 332

(b) Sidgwick's *Development of European Polity*, pp. 143,—145.

(c) *Ibid* p. 148.

(d) Greenidge, *Roman Public Life*, p. 181. The writer however observes that another element of responsibility (*i. e.* not arising from a unity of power) existed in the organisation of the Roman magistracy. The Roman magistrate, after he ceased to hold office, became subject to action both civil and criminal for a misuse of functions, in the same courts and by the same procedure by which ordinary citizens were tried. This might lead the superficial observer to imagine that the Roman rule in this respect was the same as the English. But the general rule in Rome that the magistrates were exempt from trial when in office, coupled with the fact that they held office for very short terms, obviously introduces fundamental differences in condition with consequent differences in result. The wonder is not that Republican Rome failed to develop a system of administrative law but that with its perpetually changing officials it was able to carry on the business of Government at all

IV.  
Separation of  
the Executive,  
Judicial  
and Legisla-  
tive organs.

40. The last condition, which has already been discussed, is the separation of the executive, judicial and legislative organs of the State. This really is a matter not so much of principle as of machinery. But machinery equally with principle is indispensable to the proper working of any human institution, and administration is no exception to the rule.

Summary.

41. To sum up, then, the conditions which a sound body of administrative rules and principles presupposes, these are, in the order of their importance, the following :—(i) A visibly embodied central executive, supreme in matters not subjected to control by the other organs of the State, with power in case of necessity to over-ride even this control ; (ii) a recognition of the fact that it is the State which exists for the welfare of the individual subject and not the latter for the former—though the State being indispensable to the attainment of such welfare, it is also the duty of each individual subject to co-operate with the State and to offer it his best services in the pursuance of their common end ; and ( more as matters of machinery than of principle but none the less indispensable for that ) (iii) the separation of the State and the Government, and (iv) the separation of the legislative, judicial and administrative organs of the State. All these factors combining produce the condition referred to at the end of the last section, in which the Government becomes in fact as well as in theory a trustee for the people as a whole, being pledged to pursue solely and exclusively the common welfare and by methods which are lawful, that is to say, in accordance with principles of justice and fair dealing not dissimilar in character from those by which law insists on regulating the affairs of individual subjects *inter se*.

(III) *Administrative forms and their ends.*

Administra-  
tive forms  
largely con-  
scious adap-  
tations to  
ends.

42. The conditions outlined in the last section as those which lead to administration according to law were, it is hardly necessary to say, not produced in a day. They have been evolved out of centuries of political experimentation in which not one but many nations have joined. Political evolution, I say advisedly, has not been a blind mechanical process. Political

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and for so long and so well as it did. But the system was bound to break down, as in the end it did, to make room for Caesarism. See Lecture III (iv) *infra*.

institutions are, amongst social institutions, those in which the inventive genius of man has found its noblest expressions.

43. "Man", said Aristotle, "is a political animal (a). This observation, one of the profoundest ever uttered by a man of genius, has been often misunderstood. For polemical purposes, it has been assumed to mean that in no circumstances can a man live otherwise than as a member of a politically organised community. Even the authority of Aristotle will not make that which is not in accordance with facts true. What Aristotle really meant to say was that man can expect to reach the fullest cultural stature of which he is capable only as a member of a politically organised society. What is wanting in this maxim is made good in another of profounder import which also we owe to the Stagirite. "The best Government", he says, "is that in which man can live his best". (b) These propositions are truer today than when they were written.

The highest end.

44. "War", it has been said, "begot politics" (c). Without committing oneself to any comprehensive theory of the origin of political societies, one may yet recognise the fact that all the earliest known forms of historic politics had for their object either defence of communal hearths and heritages from foreign aggression or the maintenance by an invading tribe of its hold upon the conquered territory and its mastery over the conquered people. War, defensive or offensive, certainly brought out that "most successful of political experiments", the host-leader and king.

Kingship.

45. Political progress does not end however with the discovery (or is it invention ?) of the king. The moment the tribes settle down into peaceful existence, the host-leader becomes an anomaly. Fresh political experiments are tried, and leadership passes to an aristocracy. So long as political consciousness remains confined within the ruling families, the Government remains a hereditary aristocracy. But that consciousness gradually filters down to the lower orders, and further adjustments tending towards democracy are made in the

Revolutions.

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(a) Aristotle, *Politics*, Book III, Ch. VI.

(b) Aristotle, *Politics*, Book VII. Ch. II. See also Berlozheim, *World's Legal Philosophies*, p. 70.

(c) Jenks, *History of Politics*, Chaps. VIII & IX.

Other difficulties in the way of rational adaptation.

Government. These changes do not occur automatically. They are *made*, in fact *wrested*, and that not always very peacefully, from unwilling hands. The Greek city States changed their constitutions more freely than their private law. In Rome, the earliest *leges* were more concerned with changes in the public than with alterations of private law. Revolutions, whether amongst the ancients or amongst modern nations, what are they but experiments in government-making, more or less hazardous and attended with degrees of violence ?

46. The highest political wisdom, as Aristotle did not fail to realise, is to forstall and avoid revolutions. The best constitution for a Government is that which can always adapt itself to the changing needs of the community.

47. If the political consciousness of a people had always accorded with the real needs of the community, reform of Government would not have been attended with many of the difficulties that beset it. The needs of a community are determined by an almost incalculable variety of factors, geographical, physical, social, political and economic. The existence of other political communities with needs, aims and purposes of their own, operating in varied relations of agreement or conflict with itself, may alone determine its inner organisation in a manner opposed to the political consciousness of its people. The very traditions and inherited character of its members, without more, may impose important limitations upon the plans of reformers.

Political fatalism.

48. But great as may be the difficulties in the way of fashioning a Government to suit the requirements of a people, nothing is more opposed to human nature or sound principles of political science than political stagnation. The difficulties which are really so may calls to intensive study should never be set up as arguments of despair. These arguments may often enough, when analysed, be found to be arguments to perpetuate vested interests in existing forms of Government.

49. Adaptation to needs is the one test of the value of a particular form of government at any particular time. The test is no doubt relative to existing conditions, for every Government is to a large extent limited by the materials upon which it has to work, but it is not entirely determined by them. Human material is in a large measure plastic

and environments yield to science. Materials when not found may be *made*. Political fatalism if it had any justification at any time has fewer justifications to-day than it ever had in the past.

50. The framing of a Government being thus a conscious process, its end as conceived by its authors and sought to be worked out in its institutions must largely determine its form. The conceived end of Governments, I am however bound to say, has rarely been of a very exalted order. It is only very recently that the true end of Governments has been formulated to be the welfare of the whole people, irrespective of classes and creeds. And it is doubtful if all existing forms of Government do more than pay lip-service to this creed.

The importance of the conceived end of Government in giving shape to the administration.

51. Fortunately men often build better than they know. Their imperfectly conceived efforts have time after time brought forth institutions of permanent social value. Besides, their very failures are often full of instruction. A study of by-gone forms of Government in relation to the ends they consciously sought to subserve is bound to furnish materials of the highest value for a comparative study of political institutions.

Imperfect realisations of the ends of Government not useless—Lessons of history.

52. All forms of Government, ancient or modern, may be classified in relation to their ends into three groups. Governments may conceivably be organised (i) for the benefit of one individual, (ii) for the benefit of a class, a family or families, or an order or orders (constituting as the case may be a minority or a majority of the inhabitants), and (iii) for the benefit of the people generally. The last mentioned form would be the ideal form of Government according to modern conceptions.

Forms of administration classified in relation to ends conceived as the welfare of one, the few or the many.

53. It may be doubted whether a Government organised only to benefit one person ever in fact existed. Even the leader of a gang of buccaneers must agree to give his followers a share of the loot, however despotically he may rule them. The patriarchal king who combined in his own person the functions of war-leader, chief priest and judge (if such a person ever existed) would govern only according to customary laws and therefore in the general interest of the tribe. The *tyrannos* in the Greek City States came into power by espousing the cause of the down-trodden majority as against a

(i) States conceived as existing for the benefit of one person.

self-seeking ruling minority. The Principate was not imposed upon Rome by ambitious military commanders bent exclusively upon satisfying their private ends, but by statesmen who had in their mind the interests of the people at least as much as their own personal aggrandisement. Kingship as an institution everywhere, in Asia as in Europe, has been decidedly benevolent in its operation.

(ii) States conceived as existing for the benefit of the few.

54. Historic instances of the second form of Government, viz : that organised for the benefit of a class, are found in profusion everywhere at all times. All Greek City States were organised expressly for the benefit of the ruling minority, so much so that even the supremely scientific intellect of Aristotle could not conceive of a State not founded on slavery (a). But the apotheosis of class rule was certainly attained in the State of Sparta.

55. The Helots of Sparta, says Professor Maisch (b), were serfs bound to the soil of estates owned by the Spartiates, whom they followed to war as esquires. They were employed also as light-armed troops and as oarsmen and even as hoplites. "The more threatening their numerical preponderance appeared, the greater was the jealousy and cruelty shown to them by the Spartiates. In order to be able to murder them without thereby bringing upon themselves the guilt of bloodshed, the Ephors every year on entering into office publicly declared war against them. Armed Spartan lads patrolled the country and slew out of hand all who lay under the least suspicion. Thus in the course of the Peloponnesian war, 2000 Helot hoplites, who had distinguished themselves in the field, were suddenly put out of the way without a trace being left. This magnificently organised system of wholesale murder throws a ghastly light on the peculiarities of the prehistoric Dorian robber State. The Helots avenged themselves by terrible revolts, which repeatedly brought Sparta to the verge of ruin."

56. Roman rule during the Republic was class rule, and most modern States of Europe have at different times passed through stages of the same rule. England, it is alleged, having been governed for centuries in the interest of the

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(a) Aristotle, Politics, Book VII, Ch. IV.

(b) Manual of Greek Antiquities by Richard Maisch. p. 16.

landed aristocracy was in the last century captured by the capitalistic interest, and similar developments have been witnessed in other European countries. Amongst by-gone polities the nearest approach to democracy (understanding by that term Governments organised in the interest of the whole people) was, I believe, to be found only in the Venetian Republic, though even she was oligarchic with reference to her subjects in the dependencies.

57. I think I may safely say that all advanced Governments to-day conceive their true end to be to serve the interest of the whole population under their charge without distinction or discrimination, but the form of Government in most of them is still what it was in the oligarchic regime. The whole world of States to-day, from Japan to Chile and from Canada to New Zealand, may be said at this moment to be engaged in trying to adjust their organisation to this new conception of the end of States with varying degrees of sincerity, courage and success.

## LECTURE II. ANALYSIS OF HISTORIC FORMS OF ADMINISTRATION.

### (I)—*The Athenian Democracy.*

1. Having classified Governments with reference to their end, according as that end is conceived to be the welfare of an individual, of a class or of the whole people, I proceed to examine some concrete instances of historic polities with reference to their forms as well as their ends.

2. I start with Athens, in which the ancient City State reached the highest level of perfection without compromising its character as such.

Athens, the ancient City State at its best.

3. Of the consciously conceived end of this State at its best we are left in no doubt. Pericles is reported to have said ; "We aim at a life, beautiful without extravagance and contemplative without unmanliness ; wealth is in our eyes a thing not for ostentation but for reasonable use and it is not the acknowledgement of poverty we think disgraceful but the want of endeavour to avoid it"—"words from which," says a

Pericles on the aims of Government.



**Real Athens.**

well-known living English jurist, "our modern society has much to learn" (a). But the passage quoted has to be read in its application subject to serious qualifications. The "beautiful life" at which the State aimed did not exist for the large slave population who toiled for the citizens on the estates; nor (since the city at the date of the speech was an Empire city) was it for participation by the citizens of the allied cities. The "life beautiful" was made possible, as I shall presently show, by the labour of slaves more numerous than citizens and by tributes exacted from the allies.

**The limitations of an ancient City State as a form of administration.**

4. This queen of City States had other limitations. A City State had necessarily to be a small and consequently a weak State, conditioned thereto by the necessity of each single citizen participating in the business of Government. The ancient City State was as it were a jointstock business in government conducted by all the shareholders who had to be perpetually in session to exercise surveillance over its agents (b).

**A citizen bureaucracy**

5. Each citizen again had in turn to serve as a Magistrate or in one of the numerous other offices, all annual, which were created with the growth of the Empire. There were in the middle of the fifth century B. C. 1400 offices going round turn and turn about amongst 20,000 Athenians. It meant strenuous work for the citizens individually and collectively. Athens was thus a great school of political training to its citizens. But officers engaged in serious work whether they are drawn from a small number or from the whole body of citizens have to be paid. The Athenian Jury courts (being panels of the whole body of citizens) were required during the period of the Empire to decide local disputes as well as those from the allied cities. Service on the Jury and later on in the Assembly had to be paid for. The whole body of Athenian citizens was thus converted into a bureaucracy maintained out of the labours of the slaves and tributes of allied cities (c).

(a) Pollock's *History of the Science of Politics*, p. 11

(b) Greenidge's *Greek Constitutional History*, pp 163-164.

(c) The serious limitations which her position as "Tyrant City" imposed on her ideals as outlined by Pericles are very well brought out by another speech of the Athenian statesman reported by Thucydides (Thuc. II 68) to

6. Athens never learned to treat her allies well. They were the means and instruments of her greatness and nothing more. How could a City State absorb, and be one with another distant City State? The problem was solved in later centuries by Rome but not in the happiest way. But it was not solved by Athens in any way whatever. When the allies broke away, Athens's occupation as the "Tyrant City" was gone.

Athens and  
her allies.

7. The Greek City States further lacked any principle of cohesion amongst themselves. Persia, defeated by a temporary coalition effected by the statesmanship of a single soldier, went on controlling the destinies of Hellas by playing one State off against another. The Leagues which grew up later were little more than confederacies which melted before the legions of Rome.

8. Alexander, it is alleged, having conquered an Asiatic empire with the aid of Greek valour, degenerated into an Oriental despot. He could not maintain the empire otherwise. The Persian form of administration was better suited to an empire than the Hellenic.

Hellenism as  
a form of  
Government  
unsuited to  
an Empire.

9. "Hellenism," says Professor Hogarth (a), "was and remained essentially a property of communities small enough for each individual to exert his own personal influence on political and social practice. So soon as a community became in number and distribution such as to call for centralised, or even representative, administration, patriotism of the Hellenic type languished and died."

have been delivered in 430 B. C : "Do not imagine you are fighting about a simple issue, the subjection or independence of certain cities. You have an empire to lose, and a danger to face from those who hate you for your empire. To resign it now would be impossible—if at this crisis some timid and inactive spirits are hankering after righteousness even at that price! For by this time your empire has become a Despotism (*Tyrannis*), a thing which it is considered unjust to acquire but which can never be safely surrendered". The sentiment recorded in the last sentence will no doubt find an echo in the hearts of many an Imperialist statesman of the present day. From being the "Saviour of Hellas" as she was in the Persian war, she had come to be regarded at the opening of the Peloponnesian war as "The Tyrant City". See in this connection a most instructive chapter (Ch. V.) in Prof. Murray's *Euripides and His Age* (Home University Library).

(a) D. G. Hogarth's "The Ancient East" p. 280.

Appreciation  
of the internal govern-  
ment of  
Athens.

10. Within the limits of its own citizen body, the Athenian polity, it must be conceded, proved a highly successful one. In relation to her own citizens, the bureaucracy of Athens never developed the peculiar faults of all bureaucracies. The one year's tenure, the constant shifting of the citizen from office to private life and back again never allowed the official to feel that he was master and not servant. The participation by each citizen in the varied work of administration moreover kept alive his interest in the State. The Athenian "loved" his city, as no other citizen ancient or modern ever did.

Athenian  
bureaucracy

"Rule of  
law" in  
Athens.

11. What about Athenian administration? It was fully adequate to the purposes it was called upon to serve. The citizen it is true did not enjoy protection from interference by the State with his private rights as citizens of modern States do. But the occasions for difference between State and citizen were few. Nor were the organs of administration, legislation and adjudication effectively differentiated in Athens. But the business of the State did not call for such elaborate differentiation. Though officials were chosen from the whole body of citizens by lot (a), each one after selection had to undergo one or more examinations intended to test his capacity to discharge the duties of the office. They were liable to impeachment for their conduct in office and to be deposed even during their year of service, whilst at the end of their term they had to submit accounts to the assembly. No wonder that under such a regime the Athenian citizens as a body attained a degree of culture never equalled before or since. "Take her for all in all," Athens stands incomparable—somewhat of a freak State but a wonderful freak all the same (b).

Athenian cul-  
ture.

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(a) The Ten Generals only were directly elected, as were the Archons for a few years after 508. B. C. Hammond, *Political Institutions of Ancient Greece*, pp 80, 101.

(b) See Greenidge's *Greek Constitutional History*; Fustel de Coulanges, *The Ancient City*; Maisch's *Manual of Greek Antiquities*. The Government of Sparta was constituted as a military order, rather than a political body. Military discipline destroyed the capacity of the Spartiates for political activity, and when they did begin to interfere in Greek politics, their interference everywhere led to corruption, oppression and disorganisation. Hammond, *Political Institutions in Ancient Greece*, pp 55-56.

(II) *The Assyrian and Persian Empires.*

12. Before she had come into armed conflict with Greece, Persia was already an Empire "bestriding the lands like a Colossus from the Araxes to the Upper Nile and from the Oxus to the Aegian Sea" (a). The Greek City State and the Persian Empire were at every point "as the poles asunder." But she had not invented this style of polity. She was the common inheritor of three previously existing Empire States, viz:—Egypt (b), Assyria and Babylonia. The history of the growth of the Assyrian empire is not without interest to students of comparative politics.

The ancient  
Empire  
States.

13. In the 9th century B. C. when Assyria was already "the strongest and most oppressive power that the East had known," it was a hereditary military monarchy. The King was an absolute despot, who every spring called on his agricultural peasantry to resume the life of militant nomads from which they had been scarcely weaned and led them abroad on blackmailing raids into more peaceful and settled countries. By the 7th century B. C. even these robber kings came to see the un wisdom of taking peasants from off their field on annual "razzias" and evolved a mercenary army with which they used to exploit subjects and non-subjects alike. A 'robber

Assyria.

(a) Prof. Hogarth, *The Ancient East*, p. 168.

(b) The Egyptian empire (with a big break of 800 years and other smaller ones) lasted under various dynasties for nearly 5000 years until the Persian conquest by Cambyses. If it be possible to generalise on the character of an administration spread over such a long period, it may be said that the empire owed its integrity and organisation to a bureaucracy superimposed on a Feudal nobility and a fairly well organised priesthood. What it came to be under the XVIIIth and XIXth Dynasties is thus described by Professor Flinders Petrie: "There was a great spread of officialism growing throughout the XVIIIth and XIXth Dynasties. More and more place-hunters had to be kept by the taxes and fees of the people, and the burden was not diminished by finding offices for the 80 sons and 60 sons-in-law of Rameses. The vast endowments of the temples maintained an army of priests in useless lives. These drains upon the resources weakened Egypt greatly and it steadily fell into worse state under Rameses and collapsed in the tumults of about forty years later" (about 1200 B. C.). Two hundred years before, the court is stated to have "levied only for its own expenses, and the cost of administration was borne locally by the nobles." *History of the Nations*. Vol. I, "The Egyptians" By Prof. Flinders Petrie, pp. 19, 20, 32, 40.

Egypt.

State writ large', it organised itself into a bureaucracy of Governors and Royal officials, which made it the most tremendous instrument of power the world had yet seen. It did not even care if the land had peace so long as its quota of revenue and men reached head quarters (a).

14. The Persian recognised no more than his predecessor of Nineveh "the obligation to consider the interests of those he ruled and to make return for what he took". He also exacted his quota of men and money, but "free from the Semitic tradition of annual raiding, the (Aryan) Persian *reduced the obligation of military service to a bearable burden and avoided continual provocation of frontier nations*". Free likewise from Semitic intolerance, the Persian did not seek to impose his creed on the provinces. There was from the time of Darius "a regular provincial system linked to the centre by a postal service passing over State roads. The royal power was delegated to several officials, not always of the ruling race but independent of each other and directly responsible to Susa. These lived upon their provinces but had to see to it first and foremost that the centre received a fixed quota of money and a fixed quota of fighting men when required. The great King maintained royal residences in various cities of the Empire and not infrequently visited them, but in general his Viceroys were left to keep the peace of their own governments and even to deal with foreign neighbours at their proper discretion". "The Satraps", it is stated "were supplied with few, or even no Persian troops and with few Persian aides on their administrative staff".

A loosely knit  
decentralised  
empire.

15. An Empire so loosely knit together could not maintain itself for centuries as the Persian Empire did, if on the whole it was not just to the provinces. It was also successful in the sense that it ensured freedom and peace to its subjects. Its weakness as compared with the Roman Empire lay in the decentralised rule of the provinces, which offered great temptations of revolt to the satraps. Its faults as compared with the Greek City States are not to be judged by the defeat in arms it suffered from the combined powers of Athens and

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(a) Prof. Hogarth, *The Ancient East*, pp. 69, 105. See also Dr. C. H. W. Johns' brief and matter of fact account of "Ancient Assyria" in the *Cambridge Manuals of Science and Literature*, particularly, Ch V.

Sparta. That was attributable at least as much to difficulties of transport as to anything else. Alexander struck at it at its decadence (a).

(III). *The Indian Empires.*

16. The Greeks with Alexander in 326 B. C. found in India a civilisation which struck them as resembling the Persian. The comparison, it appears to me, does scant justice to Ancient Hindu polity which, it is impossible to believe, was a mere copy of the Persian. From the testimony of Asoka's edicts, corroborated by the accounts of Megasthenes and writings in Hindu institutional treatises (b), it appears that his Government was more centralised and much more efficiently organised than the Persian. It was far more benevolent in its aims, for "it included departments regulating industries and the rights of foreigners, the registration of births and deaths, trade licenses to merchants, manufacturers and the titling of lands. Irrigation was as carefully regulated as that of Mesopotamia had been by Hammurabi. Throughout the empire roads were marked every two thousand yards by milestones, while wells were dug, rest-houses built, and doctors and drugs provided. Alms were given to monks of all sects, duties were taught on set days by provincial rulers, censors were appointed to regulate morals and cruelty to animals was forbidden. Thirty edicts in various dialects record this civilisation from Mysore to the Himalyas and from the Bay of Bengal to the Bombay coast—all over an Empire stretching 1800 miles north and south—an area larger than the old Assyrian dominions" (c).

The Mourya empire of India, more centralised than the Persian.

A benevolent bureaucracy.

17. The Mussalman empire of India seems from all accounts to have borne a closer resemblance to the Persian than to the Hindu type. In the Subadar we meet the Satrap, though, under Moghul rule, an attempt was made to limit his power by associating with him a Dewan somewhat in the manner in which the Roman Emperor sought to qualify the powers of the provincial Governor by associating with him

Mussulman Empire of India less centralised.

(a). See Professor Hogarth, "The Ancient East," pp 168-174.

(b) See in particular the "Artha Shastra" of Kautilya, edited by Shama Sastri, B. A., and published by the Mysore Government Branch Press, and Rawlinson's *India and the Western World*, Appendix III, p. 67.

(c) Conder's *Rise of Man*, p. 100.

a Procurator. Kazis and Kotwals administered justice and maintained order in the towns, but the rural areas were left in charge of Zemindars and Jaigirdars. It was thus that the village communities suffered less from the imposition of Moghul imperial rule in India than similar organisations did under the Roman empire. Government undertook public works such as irrigation canals, sarais, hospitals and bridges (a). Still on the whole the Mussalman empire in India was less centralised and more loosely knit than Asoka's. (b)

#### IV. *The Roman City State and Empires.*

Three stages  
of Roman  
dolity.

18. The political history of Rome presents three stages, each distinguishable from the others and each of which will require a separate treatment.

Transition  
from City-  
State to a  
Territorial  
Empire.

19. Starting as a City State, resembling in the form of its polity and in the intensity of its civic life the City States of ancient Greece, Rome ended her career as a far spread territorial empire more centralised and despotic than any known to history. But for the testimony furnished by Rome, the world would have believed that the transition was impossible, so incommensurable the one appears with the other. The transition has to some appeared so unaccountable as the outcome of mere events, that its origin has been looked for in the peculiar ethnic composition of the Roman race which is believed to have been a mixture of Etruscan and Latin elements. The Etruscans are said to have been Turanian emigrants from Asia (the supposed home of all kinds of despotism), who brought with them the institution of Priest-King or ruler by divine right, whilst the element of government by consent, supposed to be the exclusive heritage of the Aryan race, came from the Latins. That which undoubtedly differentiated the Roman City State from the Greek was the conception of the *imperium* which whilst it armed the

The *im-*  
*perium*.

(a) Romesh Chunder Dutt's *Civilization of India*. p. 97.

(b) Plenty of references to the organisation of Government prevalent in Moghul India are to be found in the Fifth Report of 1812. See in particular the passage at the top of p. 183 in the extract in Ascoli's *Early Revenue History of Bengal*. The fact that the English and other European merchants were allowed to form settlements within the Empire, governed extra-territorially by their own laws, in itself, shows how thoroughly un-centralised the Moghul rule was.

Magistrates with absolute (but not necessarily arbitrary) power made the citizen accept discipline with a readiness unknown to the Greeks. The secret of Rome's phenomenal expansion, too, it will be presently shown, is to be found in the *imperium* however it might have arisen.

20. A few words only are needed to characterise the original City government of Rome. Very early in her career, her popular assemblies ceased to exercise surveillance over her Magistrates in the direct manner in which it was exercised to the end in Athens. Upon this followed a development by no means peculiar to Rome and one which perhaps represents a general law in the growth of political institutions. When a Sovereign assembly or Council without surrendering its claim to control the executive ceases to interfere actively in the business of the administration, administrative legislation is the only channel through which it can continue to influence the administration. This occurred in Rome, and once again in England and to some extent also in Venice. Why the popular assemblies in Rome ceased exercising administrative surveillance over the Magistrates, I need not pause to enquire. It is enough that the fact was so. Sidgwick believes it to have been due to the inherent good sense of the Roman peasantry who, contrary to events in Greece, had succeeded in securing the privileges of citizenship (a) and formed the majority in the assemblies.

The Popular Assemblies of Rome.

Administrative legislation replaces administrative surveillance in Roman Assemblies.

21 But national habits die hard. The direct control of the executive which the assemblies abandoned passed into the hands of the Senate by usage not having the sanction of law. This control found full play in war and foreign relations, but produced the most disastrous consequences in domestic politics. It created an oligarchy within the citizen body, one, moreover, which failed to obtain constitutional recognition as in the State of Sparta and failed even to qualify for such recognition as is apparent from the manner of its treatment of the Roman poor and of the allied cities without whose loyal co-operation Rome could not have risen to the position she attained in the second century B. C. The Senate had also during this period assumed power to make laws, thereby virtually displacing the assembly as the normal governing authority.

The Senate, its temporary predominance.

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(b) See Sidgwick's Development of European Polity, Lecture X.



"Rule of law" in Republican Rome.

22. But as I have said elsewhere, the people resented the exercise of this usurped authority in internal administration, and the character of that administration, since the expansion of Rome into a territorial State, during the Republican regime, was one chronic administrative deadlock. But before this stage arrived, the City was on the whole well administered. Though the Magistrates continued to exercise both judicial and administrative functions, and in matters of private law the Prætors even made laws, the business of administration was facilitated by a division of labour amongst different orders of *Magistrates*, a division which appears to have been carried as far almost as in Athens if not further. The liberty of the citizen was assured at least as well as in Athens, if not better, by the *coercitio* and *intercessio* and chiefly by the exercise of the Tribunician *potestas*. The Magistrates could besides be made accountable by action, civil and criminal, for their conduct in office, at the end of their official terms. As in Greece, offices were annual, and this coupled with the liability to action undoubtedly made for the exercise of the *imperium* with some regard for individual rights. The veto power, specially of the Tribunes, was however a doubtful blessing. It was abused and prostituted by both the Senate and the popular party for party purposes and aided in no small measure to produce the administrative anarchy of the first century B. C.

Both a City State and Empire.

23. During the last two centuries before Christ, Rome combined in herself two polities held together by her legions and the *imperium* of her magistracy. She was at one and the same time a City State, so far as concerned Rome herself, and an Empire as to the rest of her possessions. Of the former, I need say no more. The latter requires careful study.

Expansion of Rome, through the *imperium*

24. The first step in the expansion of Rome towards empire was taken when she made herself the leader of the Latin League. It was very unlike the Greek alliances, for under it Rome not only acquired control over the military resources of the allies, which for common defence the allies were willing to give her, she also obtained through the *imperium* jurisdiction for her Magistrates over the allied people contrary to all present-day notions of independent State-rights. The *imperium* gave the Magistrate when acting as military commander absolute power of life and death over the

soldiers and in fact over every one within the limits of his "province". This subjection to the coercive jurisdiction of Rome, in itself, carried with it no corresponding rights. The *Lex Valeria* (509 B. C.) only deprived the consuls of the power of pronouncing the death sentence within the City walls and under a law dating from the first year of the Republic, only Roman citizens had a right of appeal against such sentences wherever pronounced to the people in their centuries. The people of the allied cities and the provinces were subject to the consul's *imperium* without any limitation whatsoever (a).

25. Having begun as she did, Rome found, like the English in India, that she could not stop. She must go on or collapse altogether. Her *imperium* very soon covered the whole of Italy and the twenty years' campaign of Hannibal in the heart of the Republic only helped to consolidate it. The Romans, however, were far too level-headed to rest their supremacy on legal theory only. She built roads and fortresses, and planted colonies of Roman citizens to whom she gave either full Roman or the inferior Latin rights.

26. As the Italian cities had bled and spent freely to establish this empire, it strikes us as the height of selfishness for Rome to have refused to recognise them as equal allies in a truer sense than Athens or Sparta were called upon to recognise theirs. We know that the Italian allies, for themselves, did not willingly acquiesce in this one-sided arrangement. If we are to judge from the constitution which in 90 B. C. the revolted *Socii*, smarting under Roman domination and Roman hauteur, set up in Corfinium—under which deputies from the federated cities were to meet and deliberate under the presidency of elected Consuls—Rome's career as an empire, had she acceded to their wishes, would in all probability have terminated as soon almost as it began.

27. The war ended in the Italian cities winning, not places in a federation of equal allies, but simply Roman citizenship. What did this mean? The people of the Italian cities were enrolled in eight new tribes, making the number forty-three,

Roman  
citizenship.

(a) See on this subject Greenidge, *Roman Public Life*; Fustel de Coulanges, *The Ancient City*; Arnold, *Roman Provincial Administration*; and Warde-Fowler, *Rome* (Home University Library).

and thus obtained, first, the *jus suffragiorum*, the right to vote at the elections of officials, and the *jus honorum*, i. e. the right to stand for election to offices. In order that the Italians should not permanently remain in a minority, these votes were subsequently distributed amongst the original thirty-five tribes. These privileges removed the bar of inferiority and offered openings to ambitious Italians to sojourn to Rome and bid for Roman magisterial offices on their way to passing into the ruling aristocracy of the Senate. But it did not go far towards giving the Italians generally a share in the Government, for to be able to vote every Roman citizen had to come to the City. The only possible means of giving the scattered population of an extended territory a share in the governing power, the modern system of representation, had not been discovered in the ancient world. The Roman citizenship was valued by the great majority of citizens of the Italian towns really on account of the *jus privatum*, which embraced the *jus connubii* and *jus commercii*—"the right to marry according to legal rights" and 'the capacity for making all kinds of legally enforceable contracts'".

The status of  
Non-Romans  
in the empire

28. To properly understand why the *jus privatum* was so highly prized by non-Romans, whether in Italy or in the provinces, one has to realise the position of the latter under a Roman pro-Magistrate. The conquered or allied people under Roman *imperium* did not live under Roman law—but they *did not also live under their own law*, for the Roman Magistrate was not bound by that or any other law. In point of fact he made and published laws for the provincials by means of "edicts" which his successor was in theory free to accept or reject. "Force, arbitrary rule and convention, in default of laws and principles, alone sustained society" (a). A provincial could be neither a husband, nor a father, nor a proprietor nor an heir in law, and the edicts of the governor only regularised what was essentially illegal in the various relationships implied in these positions.

29. The acquisition of Roman citizenship removed the stamp of illegitimacy from all civic and social relationship. It gave moreover the right of appeal to Rome without the

intervention of a citizen patron in Rome. Further, the Roman citizen, during this period, paid no taxes.

30. To take up again the tale of territorial expansion, Rome had been driven to acquire the provinces of Sicily, Sardinia and Spain in order to checkmate Carthage. Into the politics of Greece, Asia and Africa she entered as peace-maker and protector. But these too were gradually transformed into "Provinces" of Rome. At first the Roman Governor was content only with realising from the Provinces their dues in men and money; the cities, some of them under express treaties, others from reasons of policy, were left free ordinarily from interference in their internal affairs. Her legions secured the Empire from external aggressions and there was little inclination on the part of the provincials to cast off a yoke which whilst it pressed rather heavily in the matter of taxes (a) at the same time saved them from the far worse forms of misrule which it had been their lot to suffer in ages past.

31. In the year 100 B. C. the Roman State must have presented a spectacle unparalleled in the world's history. Like the Great King of Persia, not a King but an imperial City State, Rome, under the guidance of her soldier Magistrates and the Senate, ruled over an Empire, not composed (as the Great King's was) of individual men but of subject cities who furnished her each her quota of men and resources. The jurisdiction of her Satraps (*Pro-Magistrates*) was unlimited. The World was there to receive the impress that Rome, with her unconquerable might and unequalled organising capacity, might choose to give it. Here were present all the conditions for the development of a polity which by nicely balancing local and imperial interests and combining on that basis local self-government and central control might bring into existence a polity made impregnable to external attack not merely by

The Roman  
Empire in 100  
B C — Un-  
realised  
possibilities.

(a) The system of farming the taxes of the Provinces tended to raise the amount of provincial tribute to a very high figure and left the *publicani*, the tax farmers, to realise as much more as they could. The system operated so harshly on the provincials in Asia that even Mithridates was able for a time to pose as the liberator of the Provinces from Roman misrule.

Causes of its  
breakdown.

the strength of her mercenary legions (p) but by the love of her subjects. What glorious opportunity to solve the problems of administration for a whole millennium! Had an angel of heaven been sent down at this critical juncture to take the helm of affairs in the City, this political miracle might have been accomplished. As it was, she fell a prey between a blind perverse reactionary Senate of ex-officials, determined at all hazard to maintain their unconstitutional hold over the greatest empire the world had yet seen, a semi-pauperised populace, constitutionally the Sovereign people but capable of being led by demagogues and ambitious generals into this or that policy by offers of shows and doles (b), ambitious soldier-politicians who exploited now the cupidity of the populace and now the senseless conservatism of the Senate for their own personal aggrandisement, and last, but not the least, a body of capitalists enriched by the spoils of war who mainly by getting control of the machinery of provincial taxation sucked the life blood of the empire like vampires.

32. In the event Rome found her salvation not in a parliament of nations, in a federation of the world, but in a *military despotism* which was destined to grind every institution of the Republic—her assemblies, her Senate, her Magistrates, her taxgatherers and moneylenders, her cities enjoying various grades of privileges (Colonia, Municipia, Latinitas, Fœderati and Stipendiariae) and smaller local units (Fora, Conciliabula, Vici and Pagi)—into one undistinguishable mass of atomic dust. But before I proceed to trace the course of this new empire of despotic monarchic rule, I must pause to gather a few lessons of Republican Rome.

(a) The citizen army of peasants which made Rome the Queen of Italy proved inadequate for the extended demands of the Empire which could not be maintained by an army which must return after each campaign to the fields. From necessity and not choice, Rome had to organise and maintain an army of mercenaries with consequences the reverse of beneficial to the Sovereign populace. At the end of every campaign of conquest, the disbanded soldiers, who had no land to take them back, came to Rome and swelled the ranks of the unemployed who, however, being Roman citizens were the voters to choose the empire's Magistrates and generals. Their votes had to be purchased by ambitious office-seekers by distribution of corns and largesses and free gladiatorial shows.

(b) See Sidgwick, *Development of European Polity*, p. 156.

33. The fall of the Republic cannot, I think, be laid at the door of the pauperised Roman Assembly. The degradation of the Assembly itself was the work of the Senate who opposed and wrecked every scheme of reform brought forward by statesmen like the Gracchi. The generals who utilised the forces of corruption and disorder were also products of that regime of anarchy and the instruments of its consummation, not its cause. The fault lay with the two orders, the Senate and the Equites, the oligarchy of ex-officials and the greedy capitalists. The former were reactionaries to the tip of their fingers, the latter corrupt. I find nothing to justify the charge of corruption generally levelled by historians against the Senate (a). The Provinces were exploited not by the Senate, nor even by individual members of that body with their connivance, but by • the *publicani* and *negotiatores* (tax-farmers and money-lenders) operating in collusion with provincial Governors or with their countenance. On the other hand the Senate passed or approved law after law of increasing stringency to cope with corruption and extortion by officials in the Provinces. The *Leges Repetendarum* not only provided sufficient penalties for misdeeds of this description but also gave the *civitas* to any provincial on whose complaint a person was convicted. The *leges*, says Arnold (b), would have sufficed if strictly enforced. They could not be, because by the *Lex Servilia Glaucia* (100 B. C.), Judices before whom these offences were to be tried had to be taken from the equestrian order, the very class of people to whom (Senators being disqualified), the taxes of the Provinces were farmed. No Governor who placed himself between these sharks and their victims was safe on his return to Rome. Even Cicero had to counsel his brother to keep on good terms with them in his Province. It is significant that all through this epoch of dissolution, the question of the composition of the Judices, whether they should be recruited exclusively from Senators or Equites, continued to divide the parties and that this particular controversy reached a solution in 70 B. C. in a compromise under which the Judices were thenceforth to be appointed from Senators, Equites and *Tribuni Aerarii*. It meant a partial capture at least of the central organisation which controlled the provincial governments by the capitalistic

The oligarchy of ex-officials and the capitalistic interest in the City really to blame.

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(a) Arnold, Roman Provincial Administration, p. 82.

(b) Arnold, Roman Provincial Administration, p. 71.

interest. The net result was the organisation of a bureaucracy all-powerful in the Provinces for the purpose of being used as an instrument of extortion and exploitation in the interest of greedy capitalists. Twice again in history was this phenomenon reproduced. Once at the period of decadence of the Medieval City States and again in Bengal in 1765 on the accession of the East India Company to the Dewani. Of the former I shall speak in some detail presently. I need only briefly refer here to the latter as I may not have occasion to refer to it again.

A historic parallel.

34. In 1765, "all the wealth of Bengal", says Professor Ramsay Muir (a), "lay at the mercy of the Company's servants. And as by the very term of their indentures, their chief object in India was to make private fortunes for themselves, they used their opportunities without hesitation." "The Dominions of Asia", wrote William Bolt, a former employee of the Company, in the preface to his book "Considerations of Indian Affairs" written in 1772, "like the distant Roman Provinces during the decline of that empire, have been abandoned as lawful prey to every species of speculators" (b). Bengal, and in fact India, was just saved from this fate by the strong measures taken by the British Parliament (c).

The Principate.

35. With the advent of the Principate, all this was changed. Briefly speaking (and disregarding transitional arrangements) the Prince gradually drew into his hands all the powers of the Central Government in Rome, legislative executive and judicial, and all powers exercised in the Provinces. In the City, the old annual elective Magistracies were virtually reduced to honorary offices, power and responsibility passing to new officials from the Emperor's personal entourage, who held office at his will. It is from this same class of men that the Emperor appointed his Legates (Governors) and Procurators (Financial Agents) for the Provinces. At the centre, Government developed into a regular Secretariat of seven ministerial departments in each of which "the inferior functionaries were hierarchically subordinated or

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(a) Professor Ramsay Muir, *The Making of British India* (1915), p. 4.

(b) *Ibid* p. 99.

(c) The Regulating Act of 1773, secs. 21 to 27; Prof. Ramsay Muir's "*The Making of British India*" p. 133.

to the other and placed under a chief of service, who alone was in direct relation with the Prince" (a). Hadrian created the Roman Civil Service, the first in the world of its kind. Each grade of officials was created into an order of nobility, and towards the end of the empire holding of office came to be the only title of nobility. An official caste, in other words, directed and controlled from the centre came into being, loyal as well as conscientious. The amounts of tribute payable by the Provinces were fixed and (customs duties and certain indirect taxes of minor importance excepted), farming of taxes was abolished, the *publicani* being thus deprived of all opportunities of exploitation. Taxes having been abolished in Italy, the Emperors had to depend chiefly on the Provinces for revenue, and self-interest if no higher motive led to his exercising strict surveillance over provincial Magistrates. City governments were organised on the model of Rome, being in the hands of a body of Senators elected from amongst the richest citizens. The city officials elected by this body from among themselves discharged the mixed executive and judicial functions usual with the Roman magistracy, subject however to the Senate's orders. Order was evolved out of chaos and opportunities of oppression and extortion were reduced to a minimum outside the cities. The daily business of Government in all its ramifications now taken away from annually appointed elective officials was handed over to a hierarchically organised body of experts who were more honest and efficient and better supervised than their predecessors. Even local institutions were encouraged and fostered (though subject to official patronage), for, moved mainly by considerations of finance, new towns or other analogous organisations were established all over the Empire, which, at the same time that they were charged with the collection of taxes from the surrounding districts, were also given self-governing constitutions of a more or less democratic complexion (b). When therefore

First stage :  
A centralised  
bureaucracy  
not inimical  
to local  
liberty.

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(a) Brissaud, *History of French Public Law*, p. 31 ; Arnold, *Roman Provincial Administration*, p. 133.

(b) Before the bureaucracy had fully developed, this was the only feasible means of bringing foreign territory under Roman rule. The relation between the Imperial City and the smaller commonwealths was at this time necessarily feudal, so much so that the Emperor was habitually averse to interfering in their internal administration. It was the cities, parti-



about 212 B.C. Caracalla conferred Roman citizenship upon all free-born inhabitants of the Empire, it looked as if the Empire was about to become a federation of free towns locally self-governing—their inhabitants all enjoying the blessings of Roman peace and the benefits of Roman law and held together in chains of indissoluble union by an efficiently organised and virtuous bureaucracy. That bureaucracy at this time had undoubtedly reasons to be pleased with its work, for the Empire in all its parts, inspite of wars of succession over the Principate and wars with the barbarians on the frontiers, visitations of pestilence and incompetence or worse of individual Emperors, was now flourishing exceedingly.

Development  
of bureau-  
cracy.

36. Meanwhile, the bureaucratic machine forged by Hadrian was being made more and increasingly more perfect. As the machine grew in perfection it went on increasingly to absorb within itself the vital forces of the commonwealth until towards the end nothing was left but the machine, and the life which to all appearances was pulsating so vigorously within its framework during the first two centuries of the Principate was all but dead.

37. The present administration of India, in the view of competent observers (a), presents such striking parallels to the Roman administration under the later Empire that the fortunes of the latter cannot but be a matter of deep interest to students of the Indian administration.

The reforms  
of Diocletian.

38. The “enlightened” bureaucracy originating with Hadrian attained perfection in the reign of Diocletian (b).

cularly the newer foundations, that invited imperial interference which grew simultaneously with the development of that instrument of centralisation, the Imperial Civil Service. Reid, *The Municipalities of the Roman Empire*, Ch. XIV, p. 474.

(a) E. g., Lord Bryce and Sir Charles Lucas both of whom have contributed valuable studies on this topic, the former in his “Ancient Roman Empire and the British Empire in India”, and the latter in his “Greater Rome and Greater Britain”.

(b) The fifty years of civil war and anarchy which intervened between the murder of Alexander Severus in 235 A. D. and the reconstruction of the Empire under Diocletian in 285 A. D. might very naturally have suggested to Diocletian the necessity of over-centralisation as the only effective means then available of keeping the Empire together. Reid, *The Municipalities of the Roman Empire*, Ch. XIV, pp. 406-487. See also Lecture VII *infra*, para 10

That monarch divided the Empire into four Prefectures, Gaul, Italy, Illyria and the East. Each was governed by a Prefect who provided for its subsistence and exercised important judicial powers. The four Pretorian Prefects directed the administration and justice. Each Prefecture was divided into Dioceses administered by Vicars (twelve, later on fourteen, in all)—and each Diocese in turn into Provinces (one hundred and one, later on one hundred and twenty, in all) (a). For fiscal purposes, the Provinces were divided into lots of from 5 to 200 or more acres according to circumstances, called "*juga*" in the East, "*centuries*" in Africa and "*millena*" in Italy, and a definite amount of tax was assessed on each lot. Every stage of this hierarchic organisation meant offices and officials. But all these converging channels to the imperial treasury failed to draw from their sources the taxes, which naturally became the chief concern of an overgrown and expensive bureaucracy. The city organisation itself was converted into the Empire's tax-gatherer, the city Senators being made jointly and severally sureties for the quota payable by it and the outlying areas of the district. A seat in the Senate, at first a coveted honour which needed guarding against corruption by stringent electoral laws, now becomes a veritable punishment. As candidates do not offer themselves for election, the honour is conferred on unwilling citizens supposed to possess superfluous wealth by imperial patents and the office is made hereditary. The Magistrates cease to be elected, the outgoing Magistrates nominating their successors. An inscription of Aquileia shows that a statue had been voted for a man who of his own accord had given in his name for election to a municipal office! Why did not the Government dissolve the municipalities and govern the Empire, down to the smallest units, by imperial agents? The Government was by no means averse to exercising such direct official control over these units. As a matter of fact, Curators were frequently appointed from head-quarters to perform the functions of the city authorities in their name. But to abolish the *decuriones* (the Senate) would have been to destroy the best security the State had for its taxes which as assessed were so heavy that to recover them direct from the people would have been extremely

Bureaucracy  
in excelsis.

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(a) Brissaud, French Public Law, p. 31; Arnold, Roman Provincial Administration, pp. 183-187.

difficult, if at all possible. That the sureties might not fail, the richest people were pressed into the corporation. Men were in fact tied to the offices for the same reason that "*coloni*" were tied to their lands, viz., for taxation purposes. No wonder *decuriones* and *coloni* alike, when able, fled to the deserts or crossed the frontier and sought asylum with the barbarians (a).

39. Why were the taxes so heavy? "There was", says Arnold, "such a vast increase in the number of unproductive officials that the receivers of public money seemed to be more numerous than the payers of it. The Government had ceased to be an organism, it had become a machine—"a dead thing working with a kind of fatal regularity and with no principle of life or growth" (b).

40. "Rome", says Arnold truly, "had undertaken an impossible task, that of ruling an immense empire without federation and without a representative system, where the only sources of power were the supreme Central Government and the army. It would be puerile however to blame her for

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(a) The *coloni* who were serfs were assessed with a poll-tax which the owner of the estate had to recover for the State. It was to the interest of the State not to let the *coloni* run away from the land with the tax. Hence the law making him a serf. Brissaud, History of French Public Law, pp. 49-52. "The *curiae*, the *coloni* and the members of the *colleges*" (incorporated associations of workers), says Dr. Reid, "were equally turned into hereditary castes, whose lives and property were subject to external control...There was compulsory service for all of them...If they attempted to break the bonds of duty, they were hauled back, and a reward was given for their apprehension, five gold pieces for the capture of a member of a local council, one for that of a member of a college...The progress towards enslavement was accelerated by the concentration in the hands of the Government of a vast amount of property connected with industry...In a hundred different ways the administration pressed upon the workers...Workers were eager to find any way of escape, ordination in the Christian church, service in the army, flight into barbarian lands. But every avenue of relief was blocked as far as possible. The army became self-recruiting and membership of it hereditary. Men could not be spared from the towns for service, and if a *collegiat* enlisted and was discovered he was sent back. The fixity of the grades of society naturally intensified the need to employ barbarian forces. Reid, The Municipalities of the Roman Empire, pp 521-522.

(b) Arnold, Roman Provincial Administration, Chs. IV. and V; also Guizot's History of the Origin of Representative Government in Europe, Part I, Lecture XXII. Reid, The Municipalities of the Roman Empire, Ch. XIV. pp. 488-492.

not having grasped and applied ideas which were foreign to antiquity and which have only been worked out by the slow experience of centuries". (a).

41. This deadly centralisation affected every portion of the body politic. Justice formerly administered by Magistrates with lay assistance (*judices*) is from the time of Diocletian dispensed by Magistrates alone. Even labour is officialised and trade strictly regulated, often incorporated as were the cities, to facilitate subjection to official tutelage (b).

42. This splendid organisation, perfect in all its parts, Its end. did not meet with a violent end at the hands of unappreciative barbarian invaders of the Empire, over whose imagination it appears in fact to have cast an irresistible spell, and it cannot be claimed for it that it did not have a fair trial. It broke down, it appears, under its own weight. It failed to stem, and in fact grievously accentuated, the economic ruin that ate into the vitals of the Empire. Wealth whether in land or money accumulated in a few hands. The smaller proprietors became the serfs of the owners of large estates or entered into *pacts* of *hospitium* which latter even prohibitions of law failed to check. The over-taxed middle classes who constituted the bulk of the city population, so far from having any motive to co-operate with the State, began to look on barbarian invasions with indifference, if not with feelings of actual relief. Public authority thus became enfeebled ; and towards the end the State was driven by its fiscal necessities increasingly to buy the assistance of the larger landowners in exchange for privileges and immunities which converted the owners of "villas" into feudal lords. The bureaucratic organisation

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(a) Arnold, Roman Provincial Administration, p. 167. Sir Charles Lucas (late of the Colonial Office) commenting on this passage in his interesting study, "Greater Rome and Greater Britain (1912)", writes : "It seems strange to say that the task was impossible when it was performed so long and so efficiently, and it has yet to be proved in the history of the world that a military despotism in Roman hands was not as longlived as, or more longlived than, sounder systems in other hands". It seems remarkable that a cultured citizen of the most enlightened of modern empires should in 1912 A.D. put forward a test of excellence in Governments which was obsolete at least when Aristotle wrote his "Politics", in the 4th century before Christ. According to this test, the empires of the Pharaohs, the Manchus and the Shoguns would have a better claim even to Sir Charles's admiration than the Roman.

(b) Brissaud, History of French Public Law, Ch. I, pp. 48-49.

appears to have been killed by its very excellence. The fact, finally, that the standing army of the Empire came in the end to be recruited overwhelmingly from amongst the barbarians across the frontiers shows how completely alienated were the sympathies of the ruling caste and the ruled (a).

The advent  
of Feudalism.

43. When the barbarians broke into the Western Empire and carved kingdoms out of its ruins, they came with the spirit not of destroyers but of pupils. They adopted Roman law and even the Latin language. But much as they would have liked it, they failed to adopt the bureaucratic organisation. Perhaps they could not do it. The bureaucracy was essentially a product of civilisation. It could be maintained, as it had been built up, only by hard thinking and scientific adjustment. It could not be borrowed and worn by admiring savages like a cap or a coat. The barbarian tribes without exception accepted monarchy of the Roman type as the only possible polity. But they preferred to organise the administration rather on the feudal than on the official model. Both models were furnished by the institutions of the waning Empire. The bureaucratic organisation moreover could thrive only in an atmosphere of peace. The anarchy which followed the breaking up of the Western Empire offered only one way of escape, *viz* : through Feudalism. But the same polity developed also in the Eastern Empire. If the Eastern Empire was able to maintain its existence for another 800 years, the credit is not due to the bureaucratic organisation which it inherited from Diocletian. By the tenth century, Feudalism is as well established in the Eastern Greek Empire as in the Barbarian West (b).

(a). Brissaud, *History of French Public Law*, pp. 56-58 ; Arnold, *Roman Provincial Administration*, pp. 262-264 ; also H. W. C. Davis, *Medieval Europe*, pp. 1-23, and Reid, *The Municipalities of the Roman Empire*, Chs. XIV & XV.

(b) Jorga's *Byzantine Empire*, p. 101. Upon the topic of Imperial Roman Administration, Dr. J. S. Reid's "*The Municipalities of the Roman Empire*" (1913) deserves the closest study. The general impression left on the minds of classical students that "the Romans ran, so to speak, a sort of political steam-roller over the ancient world", he rightly says, "has no semblance of truth" as regards the early days of the Empire. He certainly proves beyond refutation that the "Augustan peace" established in the beginning of the Principate thrived upon and for a time proved a veritable nursing ground of municipal liberty, and that in the beginning at any rate the Central Government interfered with the internal administration of the localities, if at all, at the latter's invitation and that too reluctantly.

# LECTURE III

## ANALYSIS OF HISTORIC FORMS OF ADMINISTRATION (*Contd.*).

### *V—Feudal and post-Feudal Monarchies.*

1. A centralised monarchy spread over an extensive area of land had at this period only two lines of development to follow (a). It had to be either feudalised or officialised. The difference between the two was that in the former public authority was decentralised, while in the latter it organised itself in a centrally controlled bureaucracy. Of course, no monarchy, however completely feudalised, could do without some controlling central organisation, without ceasing to be a monarchy, just as no bureaucracy could really do without some devolution of discretionary authority to local agencies. The matter is really one of proportion.

2. Remembering this caution, it may be said that the Persian empire, the Mahomedan empires in India and the Roman empire in the East after the seventh century were feudal monarchies. The empire of the Manchus in China and of the Shoguns in Japan were, as is well known, predo-

But even Dr. Reid leaves it hardly in doubt as to what the state of things came to be after Diocletian's reforms. "The levelling," he says, "came about as the unavoidable consequence of the deep changes which half a century of anarchy and misery induced Diocletian to effect in the Imperial system. He demonstrated that there were diseases worse than mere anarchy, which might be induced in a body politic. Vast hordes of official locusts, military and civil, blasted the productive power of the lands. The cultivators dwindled away, and many fled to the uttermost ends of the earth to escape the tyranny to which they were subjected. Some of these men even joined the barbarian invaders who were destined in the end to renovate the domains that had withered under Imperial rule" (p. 492). Again, "enough has been said to show that the very life-blood of ancient civilisation was in the cities, and that the civilisation itself was bound to die when this life-blood was drained away. In this tragedy of ruin, it is difficult to assign any great *role* to human will. No movement in history wears more the appearance of a destiny sweeping away in an evergrowing flood, imperious and irresistible (p. 522).

(a) A third, viz., constitutional monarchy based on representative institutions, was to open itself in the centuries to come, but its time was not yet. All Governments to-day are monarchies, the so-called republics being monarchies which fill the royal office by temporarily elected incumbents.

minantly feudal (a). The monarchy of Chandra Gupta and Asoka appears to have been bureaucratic, as were presumably also the empires of Egypt and Assyria. This form of monarchy reached its culminating point in the Roman empire we have just considered. It was reborn, later, on the ruins of Feudalism, in Europe—in France and Spain and in the principalities of the Holy Roman Empire. It was able to draw into its hands, as did the Roman Emperor, all public power, judicial, executive and legislative. These post-Feudal bureaucracies of Europe were, however, far less thorough and more beneficent, and, operating as they did within national limits, were less removed than the Roman from the lives of the people. They were also less symmetrical, having retained in their composition embarrassing survivals of the feudal regime. Many of the offices, for instance, in France—in fact all judicial and financial offices—were held on a purchaseable tenure and not entirely at the will of the executive (b). The “Parlements” were a perpetual thorn on the side of despotism (c). The States General (d), as events showed, had been only slumbering—not dead. But the Government was controlled from the centre by a Cabinet of Ministers and Secretaries of State, apportionment of business amongst whom, beginning on geographical lines, came in the end to be functional. The provinces were, towards the end, ruled by Royal commissioners, called Intendants, who however, in consequence of feudal survivals, could not absorb all judicial functions, for Parlements, Provosts’ and Bailiffs’ Courts remained active, producing in the administration of justice a confusing particularism which compared unfavourably with the administration of justice in Rome and

French bureaucracy not nearly as thorough as Roman.

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(a) The Chinese mandarin is popularly assumed to be the perfection of officialism. That, however, is not what one gathers from Professor Giles’s discriminating account of the “Civilization of China” in the Home University Library Series. An equally informing short account of Japanese civilisation is obtainable from Prof. Longford’s “Evolution of New Japan” in the Cambridge Manuals of Science and Literature. It must be noted however that in Persia, China and Mahomedan India, the Provincial rulers as a rule were appointed and not hereditary officials, as they would be in feudal politics of the Western European type.

(b) Brissaud, *History of French Public Law*, pp. 388-389, notes.

(c) *Ibid.*, pp. 445-451. These, it must be noted, were in France courts and not popular assemblies.

(d) These were the assemblies of representatives of the estates in France.

England. Although cities and villages fell under the guardianship of the Intendants and control by the administration was extended to the parishes and even to the vestry boards, the local institutions were never made the agents of the Central Government and sureties of its revenues as in the Roman Empire. Brissaud's estimate of the *role* of the Intendants in France under the monarchy is as follows :

"They introduced and caused to prevail in all the provinces the spirit and the views of the central authority. It was they who gave security to all and subjected the privileged classes to the common law, a task before which the ordinary judges and the local authorities had too often shown themselves powerless. We owe to them the erection of great public works and useful encouragement to agriculture and industry. In many respects their action was enlightening and beneficent" (a).

3. It was on the rock of national finance and economics that the revived Royal power of France ultimately split. Its end. The defects of the former are thus summarised by Brissaud : The arbitrary fixing by the King of the total amount of the tax and of the sum total of the public expenditure ; inequalities among the Provinces ; special privileges which placed the burden of taxation upon the poor ; harsh, vexatious, and costly methods of collection ; an insufficient budget, lack of publicity, lack of control over expenditures, tremendous disorder in the accounts, the system of special charges and consequently of incessant payments by transfers of accounts ; lack of a special financial administration in the beginning and, when it was established, the same functionaries were at once directors, accountants and administrative judges—in short, bad assessment, bad collection and bad expenditure (b). The Intendants shared in the unpopularity of the rest of the system. Their guardianship of the administration was charged with having atrophied public spirit, killed individual initiative and made men "both revolutionary and servile" instead of accustoming them to proceed by prudent reforms (c). At the outbreak of the Revolution they were abolished. They were revived however in 1800 in Napoleon's "Prefects."

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(a) Brissaud's *History of French Public Law*, pp. 411-12.

(b) *Ibid*, pp 525-526.

(c) *Ibid*, p. 412.



Feudalism,  
Asiatic and  
European.

4. Here, it is necessary to observe that the bureaucratic development of monarchy has been on the whole a somewhat exceptional phenomenon. Feudalism offers the line of least resistance, and that is the line we find it usually taking all over the world. But European Feudalism was not like Feudalism in Asia. In Asia it meant a simple devolution of all public functions exercisable over a local area to a Satrap, Mandarin or Subadar. The feudal tie in Asia was itself weaker than it was in Western Europe, being based only on force. In the only two countries where it seemed to consist with royal authority—China and Japan, the latter rested on a *cultus* of emperor-worship stronger and more genuine than that instituted by the Princes in Rome. In Western Europe the feudal tie was contractual and legal, sanctified and strengthened by oaths (a). European Feudalism was by no means opposed to monarchy in theory. Its hierarchic composition necessarily presupposed a monarchic apex.

Anti-Feudal  
Institutions—  
Cities and  
Rural  
Communes.

5. I have shown in a previous chapter how impossible it was for Feudalism pure and simple to develop into a permanent political organisation. It had either to accept the King as something more than the feudal lord—as in fact its master, or it dissolved itself in anarchy, making room in the latter case, if at all, for a centralised monarchy of the French type just considered. By what fortunate chance, the Feudal order, being caught and embodied in the monarchic organisation of England, was worked out by Royal judges and fitted into the texture of the later constitutional monarchy of that country and thus gave birth to the rule of law, understood in its modern sense, I shall describe later (b).—I shall here content myself with only mentioning what was a fact of prime importance in the history of Medieval Europe, viz:—that allying itself in the first instance with monarchy, it spread ever the whole of Western Europe and tried to absorb within itself institutions which (and not monarchy) were its true antitheses, and which, offering to it the stoutest resistance, in some places even triumphed over it. These

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(a) The Feudalism of the Eastern Roman Empire appears to have been of the other type, viz: delegated and not contractual.

(b) See Lecture V, para 12, *infra*.

institutions were the cities and rural communes of Medieval Europe. On the whole, feudal influences made themselves most strongly felt in rural areas, which they succeeded in capturing almost completely. The cities waged war with the barons with varying success, until both orders merged themselves in the new monarchies. I shall now proceed to consider the organisation of these cities and rural communes, if for no better reason, because they have left an indelible impress on modern civilisation and a legacy of administrative problems which any form of polity based purely on feudal principles must fail to solve (a).

### *VI. Cities and Rural Communes of Medieval Europe.*

6. The pressure of the Empire being removed, cities and communes all over Western Europe appear to have entered upon a career of renewed vigour, so much so that the Feudal regime which followed appears to have at first failed to destroy communal life even in rural areas which unprotected by walls and fortifications could offer but feeble resistance to the mailed knight and his followers. The village communities had perforce to place themselves under "lords" and agree to offer them services in return for protection (b). But communal possession of land and self-jurisdiction they retained almost to the end of the feudal age. The "Folkmote" survived in the "Lord's Court" in which even the serfs were privileged and required to attend to do "suit of court". Not till the law of tenures became too technical did judicial administration in these Courts pass into the hands of lawyer judges and become centralised. It needed Statutes of Enclosures and other enactments of the like kind of the Royal regime to destroy communal ownership (c).

Rise of Cities  
and Commu-  
nes.

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(a) I have in a later chapter tried to establish that modern administrative law is derived ultimately from Feudalism. That law is however being constantly expanded and adapted to embrace elements not feudally derived and even apparently opposed to it.

(b) The process is known technically as "commendation".

(c) The subject has been dealt with more or less broadly from different points of view by Sidgwick in his "Development of European Polity," Lectures XVI to XX, and by Prince Kropotkin in his "Mutual Aid," Chs. V & VI. Detailed treatment of City Governments at various stages of development will be found also in Brissaud's *History of French Public Law*, a mine of information

7. But it is communal life in the cities that need special consideration, for it is these that have given modern Europe its distinctly industrial stamp. If Feudalism has left Europe a legacy of administrative norms, the Medieval cities on the other hand have handed down to her a legacy of administrative problems which have been putting those norms to the severest strain.

Sovereign &  
non-Sovereign  
cities.

8. The Medieval cities, it must be observed, were not all City States. Some few in Germany and Belgium and a larger number in Italy fought Feudalism with its own weapons and vindicated for a time their independence of any other political organisation. Most of them, e. g. those in England, France and Spain made peace with King or Lord and embodied the compact in charters which broadly speaking entitled them to accept feudal engagements from the latter in a corporate capacity. The dues of King or Lord were defined and the cities left to manage their own affairs and to compose their own differences provided they punctually paid the seigniors their dues through, it might be, their own officers. They thus came to form "oases amidst the Feudal forest" (a).

External and  
internal orga-  
nisation.

9. The life in these "oases" was communal as in the ancient City States, but unlike life in those States, it had (except in Spain where the towns were military outposts) an industrial character. In the ancient City States the ruling body was chiefly composed of landowners, and mechanics held a very inferior status. But in the Medieval cities, ruling authority rested in the beginning in guilds of merchants and later in guilds of crafts. Handicrafts so far from being looked down upon as low occupations gave title to a share in the city government. Why this should have been so is not an idle inquiry. Though the towns had the most varied origin, the typical towns arose out of market places made specially safe by agreement amongst fighting lords and barons to promote barter and

concerning Medieval institutions. A very brief but balanced account of Medieval towns will be found in Davis's *Medieval Europe*, Ch. IX. See also Lowell's *Governments and Parties in Continental Europe*, Vol. II. pp. 59-61 for a sketch of the German Cities' struggles with the other orders. Sismondi's *History of The Italian Republics* and Letourneau's *Property: Its Origin and Development*, Ch. XVII, are also deserving of study in the present connection.

(a) Kropotkin, *Mutual Aid*, p. 127.

exchange. The inhabitants of these towns grew wealthy without owing their wealth to the land they occupied and for which they no doubt paid what would now be considered ground rent. The business which they carried on was one which neither the lord nor his bailiff properly understood, so that disputes arising within the town would be but ill-judged by any but the community within the town itself. All the more ready did it feel, when unable to resist the lord's pretensions by force, to buy him off, securing its purchase of self-government and self-jurisdiction by a written charter.

10. Their relations with the lords thus settled, how did they organise themselves inside the cities? Medieval cities unlike those of the present day were not single corporations. They were a union of distinct guilds of merchants and craftsmen who enjoyed almost complete self-government and self-jurisdiction within their own special organisations. It was only when the guilds fell out amongst themselves that the City authorities were called upon to intervene. Each guild had its own elected officials who supervised the special industry of the craft with a thoroughness and conscientiousness which excluded bad workmanship and slackness of every sort, and thus it was that the art products of the cities invariably reached a high level of general excellence. The tendency to form into guilds overcame all professions and we hear of guilds amongst beggars, executioners, even lost women! Cutting right across these organisations according to profession could be seen local organisations of streets and wards embracing all classes of people but enjoying some form of self-government and self-jurisdiction. The Medieval city was thus, according to Prince Kropotkin (a), "a double federation; of all householders united into small territorial unions—the street, the parish, the section—and of individuals united by oath into guilds according to their profession, the former being a product of the village community origin of the city, while the second was a subsequent growth called to life by new conditions." So it happened that when the central authority in the city was captured by a bishop or a noble or even a Royal intendant, the lower organisations remained on the whole unaffected, and "the inner life of the city and the democratisation of its daily life did not disappear".

Gilds &  
Crafts.

Streets &  
Wards.

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(a) Kropotkin, *Mutual Aid*, pp. 132—8.

The Medieval  
city at its  
best.

11. If this life is to be judged by its expressions in the forms of wealth which gathered within the city walls, by the architectural marvels of its public works and by the variety and ingenuity of its art products, it must have been an unusually rich and from the worldly point of view an exceedingly happy life. The fact that serfs from the neighbouring feudal tracts secured freedom by residing in the city for a year and a day shows at least that there was not much unemployment in the cities and that accession of members into the commune was not discouraged. The success of the city governments was all the more striking on account of the contrast they presented to the rural tracts surrounding them. They did more than prevent the cities from being swamped by the flood of feudal barbarism which overwhelmed the country. They secured, inside the city walls, just that condition of life in which the necessity of union did not deprive the individual of his initiative, so that the abounding energies of communities of workers found free expression in every field of art and industry.

12. And yet this life appears to have been seized with senile debility everywhere in Europe about the 16th century.

Causes of its  
downfall.

13. The Medieval crafts and guilds were, as I have said, corporate bodies which regulated and administered all matters concerning their own particular industries. This corporate existence assured to their members protection from external attack as also equality of privileges and opportunities within. But the guilds were on the other hand extremely jealous of participation in their privileges by mere strangers. After they had served their period of probation and satisfied the guild authorities about their competence to start work on their own account, the apprentices became master workmen themselves and as such entitled to membership in the guild and, through it, of the city. Gradually, however, as the craftsmen became wealthy, they ceased taking on apprentices with the object of teaching them the "mysteries" of the craft. They became capitalists employing a growing body of workmen whom they refused to admit into their associations. The guilds became close corporations confined to certain "families," an oligarchy of employers faced by a growing multitude of working men serving only for wages. This happened equally in cities

which were independent States and in others which formed parts of larger feudal governments (a).

14. The governing bodies in the cities proved their unfitness to rule in another way. Neither description of cities mentioned above was self-sufficient. All had to depend on the neighbouring rural areas for their supply of provisions and the city products needed transportation over rural tracts belonging to feudal lords before they could find a market. Many Italian and some German cities solved the difficulty by conquering and absorbing the surrounding rural area and when this happened, the city oligarchs either made themselves masters of the serfs in the rural areas, or, when they let the nobles keep their lands, joined forces with the latter in exploiting the tillers of the land. In this way was created an irreconcilable opposition between town and country, just as inside the city was created a similar opposition between a small body of capitalists and a large wage-earning proletariat.

Opposition between city and country added to opposition between employer & employed.

15. In one word, from being a government of all the working men of the city, the city government had come to be the property of a number of non-working capitalist "families", nearly the whole body of working men having been reduced to the position of labourers who having no voice in the city government must either revolt or suffer being exploited for the benefit of the ruling families. From being one of the best, it easily became the worst of all governments—that worked by capitalists frankly in the interest of capital. Even the government of the Roman Provinces during the Republic, indirectly and illegally worked as it was in the interest of the *publicani*, was less cruelly selfish and less insensately greedy than the oligarchies of the Medieval cities.

Medieval cities became exploiting capitalistic oligarchies.

16. The period of splendour of the Medieval cities everywhere coincided with the period of expansion of the craft-gilds,

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(a) In the earlier days, the communes depended always, as they had to, on trained bands of all their members. This alone would prevent them from being "close corporations". When the cities grew in wealth, they began hiring mercenaries for purposes of both defence and expansion. The motive for admitting strangers to the privileges of citizenship thus ceased. Kropotkin, *Mutual Aid*, p. 165.

the period when the "associations of workmen working on their own account" could joyously unite their joint efforts in the production of those monumental works of art and utility, cathedrals and canals, vineyards and fruit gardens, which have struck succeeding generations with wonder and despair. It was this period which bred the spirit which made the Council of Florence say: "No works of public utility or art must be begun by the commune but such as are conceived in response to the grand heart of the commune, composed of the hearts of all citizens united in one common will" (a). How was this spirit to survive a change which converted the councils into conclaves of selfish hirers of starved labour? (b).

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(a) In the 14th century, "Florence", says Sismondi, "was the Athens of Italy." Speaking of the state of things in Italy at the commencement of the next century, "Italian virtue", he says, "had taken refuge at Florence." The degradation began about 50 years later when a close aristocracy possessed itself of the whole direction of the State. *History of The Italian Republics*, pp. 122, 165, 225.

(b) This is the third instance, I have had occasion to consider, of Government worked in the interest of Capital. The disclosures in connection with the administration of Congo by that most "bourgeois" of Kings, Leopold II of Belgium, show that the danger of this form of Government is not past. It is not past even in the most advanced countries of to-day, for in that case Factory Acts and other similar enactments intended to prevent exploitation of the weak and the helpless in the interest of Capital would not require to be applied with as much vigilance as they are to-day in all industrial countries. The exploitation of the population by oligarchies of wealth is traceable to the beginning of history which has no reasons to regret the ruthless destruction of Carthage by the Roman power. How the British Parliament just saved India from being ruined by this kind of rule at the inception of the government of the East India Company is known to students of Indian History. The use of trading companies for purposes of territorial expansion fell into disfavour in England in the beginning of the nineteenth century, but towards its end, during the scramble amongst European powers for unappropriated territories in Africa and elsewhere, the institution was revived, with the express object, however, of development, not commerce [e. g. The British North Borneo Co. founded in 1881; The Imperial British East Africa Company, 1888; the British South Africa Chartered Company, 1889. The German New Guinea Co. and the German East Africa Co. date from 1885; The Portuguese Mozambique Co. from 1894; and the International Congo Co. (King Leopold's Company) from 1879] Mr. Paul Reinsch in his "Colonial Government", whilst not blind to the more sinister aspects of this method of Colonial expansion taken as a whole (see pp. 89-90), is able to contrast (pp. 163-64) the ends and the status of the British chartered companies with those of the East India and other trading companies of the previous epoch thus:—"While the older companies were primarily

17. Equally hated by the majority of the citizens and by the rural population outside, the city oligarchies, where sovereign, were easily subdued by adventurous nobles or the King, who were often hailed by the majority of the inhabitants as deliverers. In non-sovereign cities also, the interference of the King was demanded in the interest of the inhabitants. In England, a Statute of Edward VI ordered the handing over to the Crown of "all fraternities, brotherhoods and gilds being within the realm of England and Wales and other of the King's dominions and all manors, lands, tenements and other hereditaments belonging to them or any of them". Things must have been going very badly indeed to induce the Parliament to pass such a drastic confiscatory measure, not against monasteries, but against members of the third estate. The Stuart Kings had numerous charters of towns forfeited by a procedure sanctioned by Parliament, and even that of London was attacked. The city governments appear to have passed away, in fact, "unwept, unhonoured and unsung." (a).

commercial, enjoying political prerogatives only incidentally, the latter are essentially political in their purpose and exercise all the powers of internal administration. They are hence subjected to a much stricter control on the part of the Home Government, totally unlike the spirit of *laissez faire* with which the Governments of earlier days regarded the great Colonial enterprises. The modern companies do not enjoy a monopoly of commerce, nor as a rule have they engaged at all in commercial undertakings. On the economic side of their activities, they interest themselves more in industrial development, in the utilisation of mines, forests and agricultural lands, so completely is their character a result of the spirit of the age, which emphasises industrial exploitation together with the use of political methods in colonization." The shareholders of the companies appear from Mr. Reinsch's account to have been moved to these enterprises more by a patriotic desire on their part to prevent their overtasked Governments from being outstripped by rival Governments than by love of dividends. Whether this was so or not, this form of Colonial expansion is regarded only as a temporary expedient, the State stepping into the places of the companies, as soon as conditions favour such a course.

(a) English historians agree in representing the interference by Tudor and Stuart Kings with the charters of towns as having had for its primary motive the establishment of Royal control over elections to the House of Commons. This appears to have been a fact. But that the Kings had plenty of excuses for such a course in the conduct of the City authorities themselves is also conclusively established by the fact that the matter was not dealt with in the Bill of Rights or otherwise made a subject of grievance



Particularism  
of Medieval  
Cities.

18. Not the least embarrassing feature of the city-governments from the point of view of law and order was their keen particularism, wherein they present instructive analogies to the Greek City States. It was impossible for a Medieval city to love its neighbour. Occasionally, extreme danger from external aggression and the imperative demands of defence drove the cities into leagues. But the very facility with which they left one to join another showed how unstable these combinations were. In Italy they combined to defeat the greatest of the Hohenstaufen invaders, but where Emperors failed, a score of petty local dynasties succeeded, and the petty particularism of the Italian cities survived their capture by despots to present the greatest obstacle to the unification of Italy.

Inadequacy  
of both the  
City & Feudal  
Governments  
called for a  
higher  
synthesis

19. It is clear from the above account of the rival forces operating on the European arena during the Middle Ages, that the political regeneration of the Continent, if it was to come at all, could not come from the "petrified hierarchy of privileged industrial classes" of the cities alone, nor from the feudalised hierarchy of privileged landowners in the countries. A higher synthesis of the best elements of both was needed and that came through the post-Feudal monarchies.

Post-Feudal  
Monarchies—  
their me-  
thods.

20. Nevertheless it is greatly to be regretted that the Royal power did not reform the city and gild organisations instead of destroying them. For a time it seemed indeed as if there was to be no barrier between the State and individual citizens now reduced to unrelated atoms, and as if the machine of the Roman empire which crushed all other elements of society into undistinguishable dust-heaps was to be re-imposed over the countries of Europe. But meanwhile, in one country (England), by a strange irony, Royal judges, the very instruments forged by Norman autocracy for the consolidation of Royal power then in its infancy, had established the "rule of law" which Kings even must respect; and in England too, the subjects so far from being reduced to unrelated atoms had learned to organise themselves into a new union—a Representative Legislative Assembly *vis à vis* of the King, which step by step deprived the latter of every species of Sovereign power

England, an  
exception.

during the Revolution of 1688. See Redlich & Hirst, *Local Government in England*, Vol. I, pp. 26-34. Also Toulmin Smith, *English Guilds*, London, 1870, *Introd XLIII*, cited in Kropotkin's *Mutual Aid*, p. 197.

and was on the way to creating a new executive organ powerful, yet not despotic, and pledged to serve the interests of neither King, nor Lords, nor Priests, nor Commons, nor Capital, nor Labour, nor City, nor Country, but those of the people as a whole—of the people, not merely of the native British Island, but of every part of the world to which its empire was to spread, of all races and colours and of all degrees of civilisation.

21. We are, to all appearance, now on the threshold of the main object of our enquiry viz: modern administrative systems. But we must turn aside once yet to examine that most wonderful of administrative experiments, viz: the Venetian Republic.

### VII. *The Venetian Republic (a).*

22. Venice was a Medieval City State and no doubt presents features which on a superficial view may seem to bring her within the category of States I have just considered. But it would be as true to say that Venice was like, say Milan, as that the post-Reformation monarchy of England was like the monarchy of the same period of France. Venetian polity was, like the English, *sui generis*.

Venetian polity like the English an exception.

23. Both display in a remarkable degree that adaptability which constitutes the very life of a progressive community. The development of institutions in both countries was uniform and marked by few violent changes. In neither were the energies of the community at any time exhausted, as they were in most of the European States I have considered, in defending its patrimony from foreign foes. They found better employment in developing the social and political institutions of the nation.

Other potins of resemblance.

24. The city of Venice consisted of a number of islands situated in a lagoon, safe from attack on the landside by a wide expanse of water and seaward by a barrier of sandbanks, the *lidi*. Between 452, when the lagoon was first peopled by refugees from the mainland fleeing from Atilla's Huns, to 1797, when Napoleon's French troops were admitted into the city, no enemy had ever succeeded in setting his

Untouched by Feudalism.

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(a) For the following account of the Venetian Republic I am mainly indebted to Professor H. F. Brown's little masterpiece in the Temple Frimms, "The Venetian Republic", which no student of comparative politics should

foot on the islands. Feudalism which threw itself across the storm-tossed English Channel, failed to span the placid waters of the lagoon, and so it was that the institutions of Venice form the purest expressions of the communal life of the Middle Ages.

25. The first settlers on the lagoon, it may be well to remember, were not unsophisticated barbarians. They were Roman citizens familiar with Italian municipal life (a). Each of the twelve island colonies elected its own "tribune", but in 584 A. D., in order to cope with conditions introduced by a fresh influx of refugees (this time from the invasion of the Lombards), they set up a central supervising organ of twelve additional tribunes. Mutual jealousies amongst the townships, which were fully reflected in their representatives in the central committee, made this experiment abortive; and, in 697, was created the office of the Doge, filled up by elected presidents for their lives. The local tribunes remained, but liable to dismissal by the Doge who alone had the right to summon the *concio* or general assembly of citizens, and foreign affairs were placed entirely in his hands.

26. The islands, it is here necessary to mention, whilst affording safe asylum to its inhabitants had very little to present them in the way of necessities and still less in the way of amenities, fishing and salt-extracting being at this time the only two local industries. By trade only were these procurable and, to be successful traders, the Venetians had to

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omit to study in the original. To readers of Sismondi, this account will appear unduly eulogistic. The Historian of the Italian Republics has been at no pains to conceal his aversion for the government of the Venetian aristocracy and severely condemns its treatment of its oversea dependencies. But even he bears testimony to the fact that the "Venetian subjects, if they did not enjoy liberty, had at least a government which maintained justice, order and the law; their material prosperity was judiciously protected. They in turn were contented and proved themselves devotedly attached to the Government." History of The Italian Republics (Everyman's Library), pp. 107-110, 232, 233, 202.

(a) The Lagoon was, according to local tradition, settled originally by the Consuls of Padua. For what it is worth, I mention here also the fact that savants on the whole agree in tracing the ultimate origin of the Venetians to immigrants from Paphlagonia (in Asia Minor). So, more than the Romans, they were an Asiatic people. It is interesting to find Asiatic immigrants in Europe invariably displaying a high degree of talent for government, witness, Rome, Venice, the Magyars in Hungary and the Moslem dynasties of Spain and Turkey.

be hardy sea-farers and staunch businessmen. The Eastern Empire repeatedly courted and enlisted their services as sailors, for transporting troops to and from Italy. In 809, they were considered of sufficient importance politically to invite a serious attempt on the part of Charlemagne's son Pepin to subjugate them. It failed. On one point in their relations to the two Empires, the islanders had never any doubt. They had not come to these inhospitable islands "to live under a lord." As a concession, however, to the political theory of the age, they allowed themselves to be treated as a part of the distant Eastern Empire provided their practical independence of all rulers was recognised. In 810, the treaty concluded between the two Empires recognised this position of the Venetians and in addition allowed them trading rights and immunities in Italy in terms of their treaty with a former Lombard prince.

27. The powers of the Doge were far too large to suit the tastes of the Venetians. For six years from 737 to 742, they try the experiment of annual Magistrates exercising both civil and military powers. It proves unsatisfactory and the Dogeship is restored.

Constitutional development.

28. During the next three centuries determined attempts were made to make the Dogeship hereditary in certain families, and the supporters of the rival families often waged civil war within the city. In 976, an ambitious Doge who had filled the Palace with foreign bodyguards was smoked out of the palace and murdered. Another attempt led to the ostracism of the family of the Orseoli in 1032, when the dynastic movement was finally crushed by associating with the Doge a Ducal Privy Council of two members and a Senate (*Pregadi*—the invited ones). The practice of electing a Doge-consort (often the reigning Doge's heir) was made illegal.

The Privy Council & the Senate.

29. Meanwhile the food-supply of the increased population and its trading facilities having been put in jeopardy by nests of Dalmatian pirates across the sea, Venice reorganised her fleet which cleared the Adriatic of these pests. The event was signalised by the institution in 998 A.D. of the famous ceremony of *sposalizo del mar*. Every Ascension Day, the Doge went out of the lido to wed the sea with a ring. Venice consolidated her command over the Adriatic by

The beginning of sea-power.

establishing posts in Istria, Dalmatia, the Ionian Islands and the mainland of Greece.

30. The Crusades gave her the first opportunity of expansion beyond the Mediterranean. Acting as purveyors of transports to the Crusaders, she secured as the price of her services footholds in the coast towns of Syria—"a line of factories with ex-territorial rights".

31. In 1171, the Venetians broke with their nominal suzerain of the Eastern Empire. To punish Emperor Manuel for arresting Venetians and confiscating their goods in Constantinople, they fitted out a fleet with money raised by forced loans, to which all citizens had to subscribe to the extent of one per cent on their incomes, and for which they got bonds bearing 4 per cent. interest and capable of being bequeathed, sold or mortgaged (a). The expedition ended in disaster. This experience appeared to prove the danger of allowing the Doge, by working on the feelings of the people in their assemblies, to drag the community into ill-considered adventures which not only involved humiliation but created wide-spread discontent, the losses were so equally felt by the whole people. In 1172 was created the Great Council, of 480 members, returned by a system of indirect election of 80 members from each of the six quarters of the city. The powers of the *concio* were made over to this representative council, including that of appointing officers, and, amongst others, the Doge. To curb the irresponsible authority of the Doge, the Council from 1193 onwards began extracting from each Doge on his appointment *promissione ducale* or coronation oaths, which grew in stringency and number, until the Doge was reduced to a figure-head. But in proportion as the ducal authority was contracted, the circumstances of pomp attending the office were magnified.

The Great  
Council.

32. The disaster of 1172 was fully avenged in 1204, when Venice led the Fourth Crusade against Constantinople and sacked it. The Empire was partitioned, and Crete, the Cyclades and the Sporades fell to Venice, excellent outposts for her trading operations in the East. Her new possessions and her fleet made her at the same time an important European power.

(a) The earliest instance perhaps in the history of the world of the issue of Government stocks.

33. The expansion across the sea synchronised with similar expansions on the land. By 1484, her land frontiers were the Adige, the Alps, the Tagliamento, the Sea and the Po. Before that date, she had acquired Tenedos, Argos and Nauplia but lost Dalmatia and Negropont and several stations on the Morea. In 1488, she acquired Cyprus. Her Italian territories assured her of an abundant food-supply and secured the trade route to Europe across the Alps. Her island possessions and factories on the Levant secured her trade routes to the East. The acquisition of territory and the consequent expansion of trade was the work mainly of the wealthier amongst her people. Having the largest stake in the Empire, these proceeded so to organise the administration that their class should have not merely the determining but an exclusive voice in the conduct of the affairs of the city.

Territorial  
expansion.

34. In 1297, the constitution of the Great Council was so altered that membership in it was strictly confined to a certain number of families and made hereditary therein. By this *Serrata del Maggiore Consiglio* (Closing of the Great Council), it became a hereditary House of Peers, uncontrolled either by King or Commons. As however primogeniture did not prevail, the number 210 in 1296 went on increasing until in 1340 it reached 1212. It was on the whole a broad-bottomed aristocracy.

Closing of the  
Great Council.

35. On the wake of the *Serrata* came the Council of Ten. Certain nobles taking advantage of the discontent roused by the disfranchisements of the *Serrata* entered into a conspiracy to upset the Government. It was easily suppressed, but it proved to the Great Council the necessity of an executive organ which would be able to deal with situations needing secrecy and rapidity. With the Doge reduced to a figure-head, and the executive functions exercisable only by a numerous assembly, Venice had been deprived of an executive organ capable of dealing with such situations. So, in 1310, was instituted this Council of ten members chosen by the Great Council from its body, who however were not erected, as has been supposed, into a Committee of Public Safety, nor into an Ephorate. It was more like the Court of Star Chamber in England of the Tudor regime than any other foreign institution. It did not and would not act except upon extraordinary occasions and under strict safeguards. It was "governed by

The Council  
of Ten—Its  
real character

a code of procedure which was eminently just and strictly enforced. It acted judicially though in secret. It tried and beheaded a Doge (a), it tried and beheaded a commander-in-chief (b), the greatest soldier of his day. No wonder then that the "mere appearance of its chief officer, the *Capitan Grande*, was enough to secure obedience and allay a tumult among the populace." This Council might have been constituted otherwise, but it certainly was not superfluous, nor altogether unsuited to the requirements of the Republic.

The Senate  
reorganised—  
Its powers &  
functions.

36. \* As the Council proved to be far too unwieldy a body to carry on the executive business of the City, the Senate was reorganised into a Committee of 120 members taken from the Great Council, and all its functions, except legislation and election of State officers, was transferred to this smaller body. The finances of the Republic were specially under its supervision and it exercised an effective surveillance on the administration in all its branches. A college or cabinet of eight *Savii* or Secretaries of State prepared public business for the Great Council, the Senate and the Council of the Ten, and saw their resolutions carried out. The Duke's Privy Council now consisted of six members and the constitutional powers of the Doge were exercised by this "Lesser Council."

"Savii"

"Lesser  
Council",

Judicial  
organisation.

37. Regular State courts, discharging in the name of the Doge judicial functions, civil, criminal, original and appellate, were evolved. The Council of Forty (divided into a Civil and a Criminal Forty) heard appeals from the City and the Provinces and important cases might be taken direct to it.

38. Venice thus possessed a fairly advanced type of administration. But a mere description of the structure of that administration, without reference to the spirit in which and the purposes for which it was worked, would leave a very imperfect if not misleading impression on the mind.

Absence of  
caste distinc-  
tion, though  
ruling body  
an aristo-  
cracy.

39. First, as to the spirit. The ruling body might no doubt be described as a close aristocracy of wealth. But its interest was by no means limited to that body and embraced the entire community. It did not, like the Councils of other

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(a) Falier II in 1355. (b) Carmagnola in 1432.

Medieval cities, become a selfish exploiting oppressive oligarchy. Owing presumably to want of contact with feudal institutions, it never became "a petrified hierarchy" of privileged people. There was a total absence of sharp distinctions of caste between them and the people. (This is another point on which the Venetians of the City resembled the English). The whole city population participated in different degrees in the wealth brought by the city's commercial enterprises. There was little patent poverty and what there was, was amply met by public and private charitable institutions. Only 186 professional beggars set down for the whole city in the census of 1582 is certainly a record for any city at any time. "*Ce peuple est une famille*" was the verdict of a foreign observer: "Patrician, citizen and artisan felt themselves at one in the possession of Venice."

40. As to the purpose of the administration: Commerce and industry were not in Venice as they are in all modern States, the pursuit of a class or a section. Commerce was the occupation of the whole population and the pre-occupation of the Government, and the Government itself was organised to that end. The whole city, it is said, was solid in its interest in commercial enterprise. It was the Government's commercial policy that gave direction to its activities in every other line.

Commerce,  
the dominating  
interest  
of her Government  
and people

41. It was her commerce that brought into existence her fleet and it was her fleet that made her a maritime power; and she became the greatest maritime power because early in her career as a State she had nationalised that fleet. Government built most of the ships and let them out to merchants who manned and loaded them and were bound to return them intact at the close of the voyage. Private individuals might and did build and own ships, but these had to be constructed according to sizes and patterns fixed by the State. Not merely the build, but the outfit and equipment of each ship and the duties of the crew were strictly prescribed by law. Private vessels sailed and were probably compelled to sail with State fleets, under the orders of commanders appointed by Government and subject to regulations which governed State fleets. Their owners were strictly forbidden to sell them to any but a Venetian.

Shipping  
nationalised.  
Maritime  
power.



In this respect the greatest sea-power of the world to come has merely followed an example previously set by Venice.

Naval conscription.

42. The State fleet was manned originally by crews recruited by a method of conscription. "All the males between twenty and sixty in each of the six quarters of the city were enrolled and then divided into groups of twelve. One man was chosen by lot out of each group and served in the first draft. If more were required, lots were cast again"—a better method certainly than "impressment".

State controlled and State assisted commerce and industry.

43. The main trade-routes, the arteries of her national life, were marked out in their general outlines by Government, and the Senate determined the details of each voyage. "The great trade routes were represented on a large planisphere painted on the walls of the colonnade at the Rialto where the merchants congregated".

44. The comparatively few local industries, e. g. glass manufacture, the making of cloth of gold and cloth of silver, silk, metal work and lace were carefully fostered.

45. The State was the first banker in Venice and so admirably was the State Bank managed that crowned heads and distinguished foreigners sought leave to bank with it and the privilege was granted only as an act of grace and on the passing of a special motion of the Senate. When in 1501 a number of private banks stopped payment, the Venetian Government appointed a special magistracy to supervise private banking business.

46. The movements of this trade and industry were governed from the counting-houses of the very merchant princes who sat in the Great Council or the Senate. Their clerks and dependants were frequently joint-sharers in their ventures. The smaller tradesmen organised in guilds participated in this commercial life, so that the whole State has been not inappropriately likened to one vast joint stock concern in which all the people were shareholders.

Venetian "Navigation" laws.

47. The whole commercial policy of the State was guided by the Senate through a Board of Trade and other offices. That policy was protectionist. "Everything was done to foster the carrying trade of the Venetians, and the character of Venice herself as a universal mart. With this

object in view, measures were taken to prevent the natives of the subject islands from selling their produce direct to foreigners". To this extent she did exploit her colonies and dependencies. It was the same policy which prompted the English Navigation Acts of 1660-1763; and who can say that similar methods equally effective, though better disguised, do not dominate the policies of the leading commercial nations of to-day.

48. The reference to the colonies brings me to consider her system of governing her maritime and territorial possessions. In relation to these, the city, be it noted, remained the *citta dominante*—all else where dependants. The maritime possessions in the Levant islands other than Crete are stated to have been held "upon a very loose feudal tenure"—implying the payment of a tribute which presumably was never paid (a). Crete was governed by a Venetian noble elected by the Great Council whose functions were chiefly military and who was assisted by two Councillors. Under him was a Civil Governor, the Captain General and the Civil Rectors of the cities. There was a Great Council to manage local affairs in which sat Cretan Nobles and Venetian Patricians settled on the island. The other islands were governed through a Civil Governor who combined civil and military functions and who, in matters relating to shipping, commerce and custom dues, was assisted by a council of 12 chosen from among the trading merchants of the island. In her Italian possessions she preserved as far as possible the ancient statutes and constitutions of each city. But she imposed on each District or Province a Civil and Military Governor elected at Venice. Half the salary was paid by Venice, half by the District they governed. There were local Councils to look after local affairs and local Courts. Appeals against the decisions of the Gover-

Government  
of her posses-  
sions.

(a) These islands when first acquired were granted as fiefs to her more important noble families, who were understood to make the possession good and to hold the islands for the Republic. The engagement amounted presumably to little more than offering facilities for trade to Venetians in exchange for the protection given by the Republic. These were fiefs in the Eastern and not the Western sense—delegations of sovereignty rather than contracts of land-holding. I have developed this distinction elsewhere.

nors and against findings of the local Courts went to the executive and judiciary of the Capital City. (a)

Relation of  
Venice to her  
possessions.

49. No inhabitant of the colonies and territories, not even the colonists from Venice, enjoyed the rights of Venetian citizenship. There was on the other hand a great deal of local self-government. Her position might not inappropriately be likened to that of Great Britain towards her colonies before the War of American Independence. It is futile to blame Venice for her failure to confer on the dependencies semi-sovereign status and then weld them with herself into a closer federation, seeing that Britain lost her American colonies to learn that lesson towards the end of the 18th century.

Her Diplomatic  
Service.

50. No description of the institutions of Venice would be complete which omitted to take into account her diplomatic services. The Venetian ambassadors at foreign courts were the best informed of his colleagues. The State archives at Frari in which will be found their despatches to the Government from all parts of Europe bear striking testimony to the value of their work, and "modern diplomats have been known to express a desire that knowledge of Venetian despatches should be required from those about to enter the service". The diplomatic service was partly

(a) According to Sismondi, there was a marked difference in the treatment accorded by the "Citta dominante" to her Italian & oversea provinces. Writing about 1818, he said, "The Venetians always regarded these establishments beyond Italy as the Spaniards, English & Dutch at a later period have regarded their possessions in the Indies. They not only did not allow the inhabitants the enjoyment of political rights, but they denied them those of humanity; if they allowed that they were men, they at least never permitted them to forget that they were considered as an inferior race to the Italian. Instead of turning to account the superior intelligence and industry of the Greeks, they were determined to see in them no other qualities than those of cunning and perfidy; and they appropriated to themselves at the expense of the natives, and in their own towns, the monopoly of commerce. The Albanians and Illyrians, very deferent from the Greeks, were impatient of control and despised the restraints of regular industry; but they were energetic and brave. The Republic would have found in them its best soldiers and sailors, if it had received them into its armies and navies on an equal footing, but it persisted in considering them only as savages, to whom it yielded no confidence, always restricting them to the lowest ranks in the army; and when at last it consented to raise among them the light cavalry of the Stradiots, they were destined more to overrun and ravage than to defend the country". Sismondi, *History of The Italian Republic* (Everyman's Library), p. 232.

recruited from the patriciate and partly from the ordinary citizen body.

51. A sound mind in a sound body, the full healthy life of the city found expression not only in pursuits of wealth but in works of architecture, in sculpture and in paintings unequalled anywhere in their sensuous strength and richness. Venice had no time for literature or metaphysics. She lived her life so fully that she never paused to reflect on it. The Venetians "lived their poems and therefore did not write them." And yet her printing presses (founded mainly by foreigners) and her libraries were among the best of Europe. She had her schools of science, the medical science in particular, and her University at Padua. Hers were some of the earliest contributions to modern geography. Marco Polo, with whose name Indian students are familiar, was a Venetian.

Arts and  
Sciences.

52. And yet Venice passed away. She was dead long before 1797. The advent of the Turks and occupation by them of the trade routes to the Far East and the discovery of the Cape route robbed her of her commerce, and her political extinction was due less to the wresting from her of her territorial possessions by the Turks than to this cause. Venice died of inanition. The wealth of the richer families deprived of their natural outlets in commerce became locked up in landed estates whilst the mass of her people sank into deeper and yet deeper poverty. With the relics of her past splendour, she still kept up a show of magnificence and on that account remained for centuries the pleasure house of Europe's rich men. But behind this mask, "*bravi*, gamblers, broken men—the *instrumenta* of all sorts of wickedness—quacks with their vapour baths and decoctions, their salivations of mercury and fumigations (that the Government endeavoured to suppress), witches who sold philtres so strong that in place of expelling the fiend, they expelled life—flourished and fattened on a cosmopolitan population."

The end.

53. The passing of Venice is pre-eminently an event of tragic interest to students of bye-gone politics. Hers was perhaps the only one that did not die from the political incapacity of her ruling people or the inherent vices of her political organisation.

### VIII. *Origin of Constitutional Government.*

54. It remains now to trace in the briefest outline the growth of the present day constitutional form of administration.

55. The venue has now to be changed to England, for it was there that this form of Government had its origin.

Feudalism  
put in harness  
in England.

56. The polity which William the Conqueror brought over to England was the feudal polity of France. How that polity was modified in its application by the Conqueror and his sons is a common-place of English History. Suffice it to say that the royal power became so strong, that the barons either individually or combined were unable to shake it. They were the less able to do so, as the people of England, preferring the limited exactions of the King and his agents to the unbridled oppression of the nobles, almost invariably sided with the former against the latter. To Henry II is due the credit of perfecting an instrument which acted as a check upon both classes of depredators, "Sheriffs, constables, coroners and other bailiffs" of the King and the feudal nobles—viz: the Royal Courts. The Royal judges, no doubt, were wholly subservient to the Royal will, but the procedure followed by these courts and the quality of work turned out by them proved so immeasurably superior to those of the People's and Lord's Courts, that with the connivance of an overwhelming majority of the Community, they were soon able to absorb the jurisdiction of all these courts (a).

The Royal  
Courts con-  
trol both  
Nobles and  
King's ser-  
vants.

The King in  
theory sub-  
ject to law.

57. But there was no machinery to make the King observe the law, though according to feudal notions, the king was bound to follow the law as much as any one else in the kingdom. Moreover, the circumstances of the country, in particular the manner in which the estates were arrayed against each other, afforded bad kings ample opportunities to defy the law. To King John belongs the distinction of having availed himself of these opportunities so fully as to turn for the first time the entire nation against the King. But the revolt of the Barons against John, backed as it was by the

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(a) An excellent account of this process will be found in Jendwine's *Tort, Crime and Police in Medieval Britain* (1917), Chapters VII to XIII.

people, was quite unlike anything that had happened before and was possible only in a feudal polity. Its object was not to abolish monarchy and set up a new form of government—the barons did not then even want to dethrone the King. By the Magna Carta (1215), they took from the King a solemn undertaking to observe the law, and also power to choose twenty-five barons to watch over its observance. Had this last provision materialised and been made permanent, the Government of England would have been turned into an oligarchy of feudal nobles acting through a small representative Council,—a modified reproduction on a wider area of the omnipotent oligarchies of Ancient and Medieval cities—and the promises of constitutional government contained in the Charter would have remained unfulfilled (d). That provision of the Charter was however, fortunately for England, ignored and dropped by all parties concerned in it.

Magna Carta had very nearly established a Feudal oligarchy

58. The Great Charter, whilst strictly binding the King to take only such dues and services as he was entitled to under the law, recognised the fact that for carrying on the Government he might need more assistance, and one of its clauses provided that additional “aids” would be taken only if assented to by the Council of the Barons.

Otherwise it sought to bind the King by law.

59. Whether the Barons proved unwilling or unable to render all necessary assistance in this respect or whether the increasing expenses of the State made it imperative for the King to look to fresh sources of taxation, or whether both reasons combined, we find the King during the next hundred years calling together representatives of towns and counties (of the then middle classes in fact) to meet and vote taxes along with the nobles. The third estate in England

Royal need of money, the origin of the Commons.

(d) That the above supposition is not mere speculation is borne out by events which followed a similar compact between King and Nobles in another feudal country, *viz.*: Aragon. There the Barons obtained their charter, called the General Privilege, in 1283 and the right to enforce it by arms by the Privilege of Union of 1287. The Privilege of Union was fully availed of, with the result that the *cortes* obtained unlimited power of interference with all branches of the administration, executive and judicial, including even the royal household. Having acquired also the power to vote money, it soon constituted itself as the sole legislature and the *cortes* became in fact as omnipotent as the Athenian Assembly or the Venetian Great Council. Mackinnon's History of Modern Liberty, Vol. I pp. 252-256.

Growing  
sovereignty  
of Parlia-  
ment.

soon prefer to sit apart from the nobles, and in another two centuries the principle is established that only the Commons could vote taxes and no taxes could be raised by the King without such a vote. The voting of money was invariably made the occasion for demanding from the King removal of grievances arising whether out of bad law or bad administration, and from these beginnings, the Commons obtained a share in legislation. In course of time, the power of making administrative changes by royal decrees which the King undoubtedly exercised during the time of the Norman and Angevin Kings, and in fact all exclusive legislative power, is denied to him. All these powers have henceforth to be exercised by the King and the two Houses of Parliament conjointly.

60. These changes, like all similar changes, took place *in fact* long before they came to be recognised *in law*. Thus the King's surveillance of the Royal Courts continued in theory long after it had ceased in practice, at least as a regular thing. In the reign of James I, the question was mooted too late for the King and decided against him. But the power of dismissing judges, which as the head of the Executive logically belonged to him and which he undoubtedly had often exercised, was used during the next eighty years as a weapon to coerce judges, in that struggle for power between King and Parliament which was carried on practically without cessation during the whole of the 17th century. The royal judges finally won independence by the Act of Settlement of 1701 (a); and meanwhile, the struggle between King and Parliament had been ended by the Bill

(a) The Act of Settlement in terms makes judges dismissible "upon the address of both Houses of Parliament. It thus looks as if the control over the Judiciary passed from the Executive to the Legislature. In practice, as subsequent events have shown, it is virtually impossible to get both Houses to agree to dismiss a judge on merely political grounds. The provision therefore has in effect made the judges of Superior Courts in England independent of both the Executive and the Legislature. Besides, as pointed out by Lowell, the growth subsequently to this Act of the art of legislation and greater harmony between the Crown and the Houses, having lessened the temptation on the part of the Government to use Courts of law as instruments for social and political objects, the Courts themselves have been relegated to their proper function, viz. to the interpretation and application and not making of law. Lowell, *Government of England*, Vol. II. p. 476.

of Rights of 1688-9 by which the King had recognised Parliament once for all as the Sovereign Legislature and undertaken for himself and his servants to act according to law in the discharge of their executive functions.

61. Thus for the first time in the world's history was attained in law as well as in fact as complete a separation of the executive, legislative and judicial functions as is compatible with the preservation of unity in the State and the harmonious co-operation of its organs. The so-called "separation of powers", which will be found embodied in the instruments of 1689 & 1701, is one of the fundamental guarantees of the observance of law by Government and its agents under the English constitution. But it is not its only guarantee nor is it by itself wholly adequate. A certain amount of direct control must be exercised by representative legislatures upon the executive, in order that the latter may not abuse the very large discretionary power which must be entrusted to it for properly administering the affairs of the nation. The administrative machinery also must be so organised that it may itself furnish correctives to rash, indiscreet, unfair or unwise exercise of their functions by officials. These principles of lawful administration are to-day the common property of all constitutional forms of government. How these principles are worked out in practice in different systems will be the principal subject for consideration in subsequent chapters. But before we take that subject up for consideration in detail, a clearer understanding of what is meant by separation of powers and its implications will be necessary. That will be the subject of the next lecture.

Separation of powers.

## LECTURE IV.

### SEPARATION OF POWERS.

1. The separation of the Executive, Judicial and Legislative functions of Government is undoubtedly the corner-stone of the modern constitutional form of Government. But the real character of this separation can be easily, and often has been, greatly misunderstood. There cannot be a complete separation of these functions in close water-tight compartments in any form of Government, without destroying its unity and

True view—  
Differentiation and distribution, not separation.



without bringing about an administrative dead-lock even times of peace, not to speak of periods of unrest and time of war. The progress of organisation implied by it consisted rather in a *balanced* distribution of functions *amongst different organs* than in actual dissociation or even divergency in policy. Montesquieu to whom belongs the credit of securing public recognition for the doctrine did not view it otherwise. The authors of the American constitution, his earliest pupils—who are popularly represented as having made a dogma of it appear to have been fully conscious of the necessary limitations to the so-called *doctrine* of “separation of powers.”

Advocated by Aristotle for securing efficiency in administration, not individual liberty.

2. The idea that a distribution of the three functions: judicial, executive and legislative, amongst different constituted organs of the State, is conducive to efficiency in government had been fully realised by Aristotle among other ancients. But its importance in securing the liberty of the individual against encroachments by the State could not naturally be anticipated in an age in which the necessity, not to speak of the value, of individual liberty as requiring protection from State interference had not been realised or even thought of (a). Nothing in fact was done in ancient politics to translate into institutions the idea of distribution of functions favoured by philosophers, even as a means of *securing efficiency*. And, truth to say, there was no room for it, at least in the small City States of Greece. To introduce it, for instance, in Athens would have unnecessarily increased the not too small number of offices and would certainly not have promoted harmony in a community which on account of the limited number of its members loved and hated more intensely than the subjects of far-flung modern Country States. No wonder then that the *ecclesia*, the Sovereign Assembly of Athens, continued to the end to exercise all three functions, though Aristotle would have liked to see it confined to performing deliberative functions only (b).

Impracticable in ancient City-States.

(a) Aristotle, *Politics*, Book IV. Ch. XIV. It was advocated and for the same reason by Cicero & Polybius. See Garner's *Introduction to Political Science* p. 411.

(b) For the best accounts of the *ecclesia*, the *nomothetae* and the *thesmothetae* and other public institutions of Greece, consult Greenidge's *Greek Constitutional History*, Professor Richard Maish's *Greek Antiquities* and Smith's *Dictionary of Antiquities*.

In point of fact its functions were primarily administrative (covering the whole field of administration), judicial with reference to certain special offences against the public order, and legislative only in an occasional and exceptional way—for it must never be forgotten that among the Greeks (as indeed among all people until very recent times), laws were usually regarded as permanent and unchangeable, and alterations thereof were made, if at all, after a more or less careful examination by experts followed by a judicial investigation in which arguments for and against the measure were given an elaborate hearing (a). The Athenian Magistrates were both judicial and administrative officials, like the Justices of the Peace in England before the Local Government Act of 1888. They performed judicial functions again only in conjunction with the *heliaia*, who were panels of the Sovereign people. Judicial murder, such for instance as that of Socrates, was no doubt facilitated by this arrangement, but it is not clear that in Athens any other would have succeeded better.

3. Still the intermixture of functions, such as it appears to us, may be easily exaggerated. In a rough sort of way there was in Athens a distribution of public business answering to Aristotle's tripartite division into deliberative [the *ecclesia* finally confirmed all changes in the law and passed administrative resolutions (b)], executive (the Magistrates administered the laws and executed the resolutions of the Councils) and judicial business (which was mainly performed by the *heliaia* under the presidency of the Magistrates).

Partial realisation in Athens.

4. Conditions in Republican Rome were on the whole not very dissimilar (c). The Roman popular assemblies did not

In Rome.

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(a) Like the Greeks, the Romans also were averse to changing rules of private law (which, as M. Fustel de Coulanges has demonstrated in his "The Ancient City", were supported by religious sanctions) by popular vote. Only when they were proved to be injurious to public order, would they be moved to alter them by legislation. It may in fact be affirmed generally, that early legislation everywhere concerned itself almost exclusively with alterations in the Public law. Private law had to be "found" either from existing customs or by the exercise of the "divine reason" which is implanted in the minds of Magistrates and Law-givers.

(b) *Psephisma*.

(c) As to the institutions of Rome, consult Greenidge's Roman Public Life and Smith's Dictionary of Antiquities.

as a rule meddle with the administration directly. They interfered somewhat after the fashion of English or American legislative chambers, through administrative resolutions passed in the form of laws. They however continued to exercise judicial functions in regard to special classes of crimes. The Magistrates were not indeed freed from administrative control, for this power was assumed by the Senate of ex-officials more by force of usage than under legal sanction. The Senate, it is also to be noticed, passed laws (*senatus-consulta*), and in this way performed both administrative and legislative functions in almost equal degrees. The Magistrates performed both administrative and judicial functions, and the Praetor through his edicts habitually made and altered rules of private law. The *coercitio* and the *intercessio* of the Magistrates appear to have been as much judicial as administrative weapons. It is on the whole, more difficult to discover a "balanced distribution" of business, not to speak of functions, in Republican Rome than in Athens.

5. What distribution of functions there was in Republican Rome was completely swept away during the Empire. The Magistrates in the Provinces made laws, interpreted and executed them, subject to central control, in every one of these directions.

6. The complex organisation of the Venetian Republic shows considerable distribution of business, but, as must be obvious from even a superficial consideration of her institutions (a), differentiation of the three functions had not progressed much beyond that in Athens. The Doge was a figure-head. The Ducal Council and the Collegio between them carried on the purely administrative business, subject as is usual in ancient polities to constant surveillance on the part of the Senate, the real executive. The absorption of the entire executive business by the Senate left to the Great Council only the functions of appointing officers of State and legislation, and the legislative and executive functions were apparently separated. Also, the predominance of commercial and industrial pursuits necessarily favoured the growth of courts discharging more or less exclusively judicial functions in controversies arising between subject and subject. But the

In the  
Venetian  
Republic.

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(a) See *Supra*. Lecture III (vii).

the highest civil tribunal, the Council of Forty (Quarantio) also superintended the Mint and the Treasury (a) : and the highest criminal court, the Council of Ten, was really an administrative court which, though it acted according to judicial procedure, did so without the safeguard of publicity.

7. In pre-feudal communities, the Assembly was at one and the same time the army, the judicial tribunal and political organ exercising direct government, to Kings and Chiefs being left the performance of function, of secondary importance (b). The position was not altered when the Senate of Notables (Principes) absorbed most of the functions of the Assembly. Between the Assembly, the Senate and the King, the distribution of business was concentric : there was no differentiation of functions, and this, I believe, also represents the character of the distribution of business as between the Great Council and the Petty Council, and (in consular towns) the Consuls, the organs of Medieval City governments (c).

Distribution of business in Pre-Feudal & Medieval City Communities, concentric, not functional.

8. Where the feudal organisation prevailed, the position of Seigneur carried with it all governmental powers. His agents performed both administrative and judicial functions, and it was the business of these very officials also to *find* the law (d). At first no doubt the tenants attended to do "suit of court" and thus law was "found" and justice administered by a larger body, but as the law became more technical, the tenants ceased attending, and the Seigneur's agent performed these duties by himself (e). In England only, owing to a combination of specially favourable circumstances, administration of justice succeeded in separating itself from the ordinary business of administration upon the establishment of the Royal Courts and this circumstance, as I shall presently show, played the most important part in effecting that differentiation of functions which in modern States is a fundamental condition of the "rule of law". But the phenomenon was altogether exceptional.

No differentiation in early Feudal politics.

Early separation of judicial functions in England.

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(a) Courts in early times usually often performed the functions of the State Board of Revenue.

(b) Brissaud, History of French Public Law, p. 20.

(c) *Ibid*, Chap. V. Topic 3, Towns and Communes.

(d) *Ibid*, Chap. V., Topic 2, Seigniories.

(e) *Ibid*, p. 224, which also shows how judicial business came ultimately to be transferred to lawyer judges.

Absorption  
of all func-  
tions by Feu-  
dal Councils  
in Spain.

9. In all feudal monarchies, there was in the beginning a Council of the King's tenants-in-chief. In only a few instances, does this Council succeed in withstanding the disruptive tendencies inherent in the feudal organisation. In only two (a) countries was it (in one temporarily) able to weave itself into the texture of the State constitution. In Aragon, the feudal Council of Nobles reinforced by representatives of the Communes succeeded in wresting the government from the King and reducing the latter to the position of its (*the Cortes's*) agent, thus reproducing conditions resembling those which prevailed in ancient Greek Cities and pre-feudal German townships. In Aragon, the Council passed laws, called the executive to account, regulated the succession to the Crown, controlled taxation and supervised the Royal household. It exercised in addition jurisdiction as Supreme Court of Justice and any person having suit against a royal officer could come to it. It made itself even more omnipotent than the Athenian Assembly.

Progress of  
Differentia-  
tion in  
England.

10. In England, Royal authority did not, as in Spain, succumb before the feudal Council. There the third estate organised itself into a separate House, and although it soon managed to capture for itself exclusive power of taxation and a preponderant share in legislation, it did not, either alone or in conjunction with the feudal Council (which became the House of Lords), succeed, until quite recently (i. e. in the 18th century), in constituting itself into a "grand inquest of the nation" or in establishing the constitutional usage according to which the ministers of the King have to be chosen from amongst the leaders of the party which commands a majority in that House. Meanwhile, the King had succeeded in organising a judiciary which, at first subservient to the Royal will, made itself, at the instigation of Parliament itself, into an independent organ (b). We must

(a) Three, if Poland be included. But the Polish Diet really succeeded in making itself that rarest of all institutions, viz : a constituted anarchy. See W. A. Phillips's *Poland* (in the *Home University Library Series*) Ch. IV. The two countries referred to are of course England and Spain. There were at least four Governments and four Councils in Spain answering the above description viz : of Castile, Aragon, Catalonia and Barcelona. I take Aragon as the intermediate type. See Mackinnon's *History of Modern Liberty*, pp. 241 etc.

(b) See footnote to para 69 of the previous lecture.

not, in studying English institutions, suffer ourselves to be misled by names for no system of Government is so overlaid to-day with fictions as the English (a). The King's Privy Council and what in its origin was the Feudal Council (the House of Lords), between them, should be Councils of the King, advisory or legislative. But they are really Courts, separated in fact, and altogether independent of, the Executive and the Legislature. Were the two other organs, executive and legislative, similarly separated? Before the 18th century they undoubtedly were. But in the course of that century came the important change already alluded to which established the parliamentary or *cabinet* form of Government. Under that form the Parliament has in theory, over the executive, administrative control as plenary as that formerly exercised by the *Cortes* in Aragon, the *Pregadi* in Venice, or the *Eccllesia* in Athens.

11. Outside England (b), Royal authority succeeds not merely in escaping from the control of the organised "estates", but in the end in suppressing them. In France, upon the establishment of permanent taxes to meet the exigencies of the war of independence of the 15th century against England, the States General lost control over supply and consequently over legislation (c). Administrative and legislative power remained centred in the King. The Grand Council of the French King, formerly composed as in England of Feudal Barons and high officials, cast off the former element before the end of the 16th century, becoming in the result "an assembly of clerks" (d). In one of its divisions, the Council

Developments  
in France.

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(a) See the remarks in Redlich & Hirst's *Local Government in England*, Vol. 1 pp. 4 and 5.

(b) Strict accuracy would demand the exclusion of Poland also. But as to Poland, see footnote to para 9, *supra*.

(c) Students of English political history need not be told that it was through the power of voting supplies that the Commons in England acquired their right to participation in legislation. The petitions for redress of grievances which always went before the voting of taxes were the first beginnings of the Commons' right to legislate for the Kingdom. The *Cortes* of Castile and the *Cortes* of Aragon, very live institutions in the 15th century, begin to lose their power and importance in the 16th, directly the wealth of the New World begins to flow into the Royal Exchequer, thus securing his independence of the Assemblies.

(d) Brissaud, *History of French Public Law*, p. 335.

exercised high judicial functions. Previously to this, it had thrown off offshoots called "Parlements" which mainly performed judicial functions but which, as behoved what formerly were committees of the Feudal Council, also claimed to exercise administrative control in a variety of ways, to the great annoyance of Kings and Royal officials. In the 16th and 17th centuries, the Parlements were indeed the only organs which sought, though vainly, to compel the King and the Royal officials to observe the law (a). The administrative business of the King fell into the hands of ministers and secretaries. In the Provinces, the Feudal Courts had developed into secondary Royal Courts which were subject to the Privy Council aforesaid (b). The Intendants in the districts combined in themselves judicial, police, administrative and legislative powers (c).

12. In not one of the several organisations just reviewed, except in that of England, is it possible to discover a clear demarcation of boundaries between any one function and the others. Even in England, if a stranger unacquainted with the rules of the Commons' procedure and the habits of its members (which make direct interference on its part with the actual work of administration a somewhat unusual event (d)) were to form an idea of the working of the English constitution from the disposition of its parts as determined by the laws and usages of the constitution (apart from its practices), he would no doubt discover a fairly complete dissociation of the

(a) The French Parlements claimed to see that the Royal ordinances were not opposed to law. This is exactly what Feudal institutions which had survived their day and yet kept alive past traditions in their laws would be expected to do. Even so late as the 17th century, years after Sir Thomas Smith's clear-cut enunciation of the legislative omnipotence of the English Parliament (see Pollock's *History of the Science of Politics* p. 57), English lawyers like Coke who were deeply imbued with Feudal legal traditions would concede to Parliament the power only to *declare* and *defend* the law, not to *make* it. Of judicial decisions embodying this doctrine, the following may be noticed. *Dr. Bonham's case* 8 Coke 114 a, 118 a, *City of London v. Wood*, 12 Mod. Rep 669, 687, also *Calvin's case*, 7 Coke 5a, 6a. See also Gooch's *History of Political Thought in England from Bacon to Halifax*, pp. 58-65 and Brissaud, *History of French Public Law*, pp. 445 ff.

(b) Brissaud, *History of French Public Law*, p 451. ff.

(c) *Ibid* pp. 409-411.

(d) Lowell's *Government of England*, Vol. 1 p. 327.

judicial from the other organs of the State ; the further differentiation of the legislative from the executive organs would very probably escape his attention. How did it happen then, that Montesquieu in 1748 was not only able to discern a substantial dissociation of the three functions in the then English constitution but that his analysis was accepted towards the close of the century by noted English lawyers, amongst them even Blackstone ? -

Montesquieu on the separation of powers in England.

13. The explanation is to be found in the fact that at the date of the Revolution of 1688 and until at any rate the determination of Queen Anne's reign, the English constitution presented, in fact as well as in law, as complete a separation of the three powers as was over to be realised in history. During this period the King was still the head of an executive which was independent of Parliament. Locke writing between 1688 and 1700 clearly comprehended the separation of the Executive from the Legislature, and the power of the latter through legislation (and through it only) to control the otherwise free action of the Royal Executive. The independence of the Judiciary failed to attract his notice because the last step in that direction had yet to be taken in the provision of the Settlement Act of 1701 which took away from the King the power of dismissing Judges of the Superior Courts. When Montesquieu wrote in 1748, the administrative subordination of the Ministers to the House of Commons had perhaps been consummated ; but neither then, nor even up to the present moment was or has this tremendous constitutional change been embodied in any constitutional document. I doubt very much whether it was clearly formulated in any popular account of the English constitution anywhere at all before Bagehot wrote and published his famous work on the English constitution.

Montesquieu's analysis of the English Government substantially in accord with facts or at least with what everybody believed to be facts.

14. In any case, it was the world's fortune that the fact was discovered so late. Montesquieu's mistake, if it was one, helped the formulation of the greatest discovery of modern political science, that which in modern States forms the principal guarantee of the freedom of individuals—the principle which alone can reconcile the authority of the State with the liberty of the individual (a)

The World's debt to Montesquieu.

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(a) Dr. Redlich's criticism of Montesquieu and Blackstone's characteri-



Recent  
development  
towards Par-  
liamentary  
government.

15. American politicians, deeply imbued with the principle of separation as enunciated by Montesquieu and Blackstone framed their constitution in a manner which made the President of the United States independent of the Legislature and his ministers responsible to him and not to the Legislature. Germany has adopted the same scheme. Meanwhile the living forces of English political life unhampered by a written constitution were working towards and had finally established the Parliamentary executive. Her Self-governing Colonies have everywhere (with slight modifications in the Provinces of South Africa) followed her example. In France, Italy, Holland, Belgium, Denmark, Norway, Spain, Portugal and Hungary, the ministers are responsible to Parliament. In Switzerland and Sweden, as in the United States, ministers are independent of the assemblies, but in all three the Legislature by itself or through its committees is able to exercise constant surveillance over the administrative acts of the executive and, in Sweden, even over the judiciary. In Austria the ministers appear to be nominally responsible to the Reichsrath, though according to Lowell they are independent in fact. But even in Germany and Austria signs are not wanting that the Legislature will before long obtain effective control over the executive (a). In India and in some British Crown Colonies, where a distinct legislature has been constituted, the legislative organ is neither representative nor sovereign (b). Its functions are consultative, and unlike any of the forms hitherto considered, it is controlled by the executive. But the legislatures even in these countries are bound in course of time to become representative, to obtain the power of supply and ultimately to direct the policy of the executive, unless indeed the current of history is to be turned back upon itself only there.

Distribution  
of functions  
as depicted  
by Montes-  
quieu un-  
stable.

16. It is the truth, therefore, that the disposition of organs and functions which Montesquieu thought he found

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sation of the English constitution in his book on Local Government in England, Vo. I p. 40, seems to be ludicrously unfair.

(a) See Dodd's *Modern Constitutions* ; Lowell's *Governments and Parties in Continental Europe* ; Ogg's *Governments of Europe*.

(b) Colonies possessing representative legislatures but not self-governing do not strictly speaking come within this description.

in the English constitution is essentially unstable and tends to pass off into one in which, as in bye-gone polities, the sovereign legislature overshadows the executive "through its power of supply and its power to create public offices and to provide for their support". (a).

17. Again, never even in England, whether in the year 1688, or before or since, was the separation of functions absolute, nor are they so in the United States of America, in Germany or in France or in any other country where the doctrine is accepted as a sound working principle. Absolute separation would in point of fact be inimical to freedom. It will appear from later chapters that direct control of the executive by the legislature and the courts, when exercised within judicious limits, has proved greatly beneficial to citizens in England and America and elsewhere, and may within those limits be regarded as indispensable. Also in many matters, executive officials must be allowed to make administrative ordinances, which are really laws and to exercise functions in their nature judicial without reference either to the legislature or the courts. On the other hand, legislatures themselves will suffer if they are deprived of the experienced guidance and assistance of the executive in the framing of the laws (b). The point is so obvious that it would be pedantry to enumerate in detail the various points on which, in particular systems, particular departures from a rigid separation of functions is sanctioned.

Separation  
of functions  
nowhere  
absolute.

(a). Garner's Introduction to Political Science p. 425. Upon this point the development in the colonies of America prior to their breach with England is particularly instructive. England herself had not fully developed a parliamentary executive when most of the colonies were established. The Governors in all except two of the colonies were appointed officials, and their councils, except in three, were appointed by the Governor. Every element was thus present for keeping the executive independent of the legislature. And yet having the power to vote supplies and pass laws, and in spite of the Governor's veto, the assembly in nearly every colony, in the course of two-thirds of a century of incessant wrangling and bargaining and encroachments on the legal powers of the Governor, had made itself master of the administration. Prof. T. C. Smith in *The Wars between England and America*, p. 16.

(b). Important observations on the value of the participation by the executive in legislation and in particular of the executive veto will be found in Burgess's *Political Science and Constitutional Law* Vol. II, pp. 208, 252, 278, 295.

The doctrine, a sound principle of political practice, not an end in itself.

18. The doctrine is thus clearly of no value as a scientific generalization from existing institutions, nor does it point to a goal to which all States possessing a lower form of organisation must be supposed to be travelling. It represents in fact a sound principle of political practice to be put into operation in so far as it may promote good government and to the extent only to which the circumstances of the country to which it is applied will allow.

True bearing of the doctrine of separation of powers.

19. That principle is that in modern Governments in which the administration must of necessity be left in the hands of a small body of officials, it is of the utmost importance that such officials should of themselves act according to law, and that that law as also the law which they have to execute upon the people must, on the whole, not be of their own making, but law which the people generally approve of, as being most conducive to general welfare and to ordered administration, and that the only satisfactory guarantee for the observance of law by the executive is that furnished by an impartial judiciary. This principle is perfectly consistent with the power ordinarily enjoyed by the executive to supplement laws by ordinances in matters in which lack of administrative experience on the part of the legislature may make it inexpedient for it to exercise its powers; and is by no means destructive of the authority which the courts possess in English speaking countries of laying down laws binding on the executive in matters not provided for by the legislature or in regard to which the laws framed by it may have been inadequately expressed. It does not even exclude a certain amount of direct surveillance to be practised by the legislature and even by courts over the exercise by the executive of such discretionary authority as are and must be often vested in it, since it is not intended that the executive should exercise these powers arbitrarily or capriciously or harshly, and since neither the legislature nor the courts acting in the ordinary way can reach the exercise of purely discretionary authority. But such surveillance must also in the interest of good government not be unlimited, though the limits may not always be capable of precise definition and must be left to be determined in each case by the good sense of the parties concerned. In what manner direct control over the administrative acts of the executive is at present

exercised by the legislature and the law courts in different countries will be considered in subsequent lectures. (a)

20. A good illustration of the appreciation of the principle and its necessarily imperfect application in the circumstances of the country is afforded in the Marquis of Wellesley's despatch of the 9th July 1800, recommending the appointment of independent judges to preside over the Sudder Adawlat hitherto presided over by the Governor General and his Councillors. "Distinction of the Legislative, Executive and Judicial powers of the State analogous to that which form the basis of the British constitution was", according to his Lordship, "made the foundation of the new constitution of the Government of Bengal." The principle, his Lordship went on to say, could however be applied only with modifications suited to the conditions of the country. There were reasons, which he pointed out, why for the present, the Governor General in Council must also constitute the Legislature, but safeguards calculated to ensure the framing of such laws only as would be in accordance with the interests of the people were to be provided, so as to minimise the evils of a combination of both functions in the same authority (b).

An Indian illustration.

21. Since the date of this despatch progress has been made in India towards a differentiation of the legislative from the executive organs of the Government, but as pointed out already not only has the legislature had no control over the executive but on the contrary is controlled by it.

22. I have already stated that the framers of the American constitution fully understood the true character of the so-called "doctrine" of separation of powers. Madison, for instance, who was the principal exponent of the doctrine at this period, whilst affirming as unquestionable the proposition that "the accumulation of all powers, legislative, executive and judicial in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny", explained

Interpretation of the doctrine in America.

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(a) See Lectures XXIII & XXIV, *infra*.

(b) Effect was given to this policy by Reg. II of 1801 and Reg X of 1805. Reg XV of 1807 showed a backward oscillation which was subsequently corrected.

it as meaning that "where the whole power of one department is exerted by the hands which hold the whole power of another department, the fundamental principles of a free constitution are subverted"; and in defending the doctrine in this qualified form, asserted that unless the departments were so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained" (a).

As interpreted in France.

It seems clear, however, that the doctrine was both misunderstood and misapplied by the French jurists of the Revolution. The misunderstanding appears to have arisen partly from a deep-rooted prejudice entertained by the French people towards the courts of law (b), and partly to the traditional habit of French public men to look to a strong central executive as the chief if not the only guarantee of the people's liberty. However that might be, in the republican constitutions of the Revolution and in the constitution which Napoleon gave France, care was taken to secure the executive from interference by the judiciary. The newly created legislature no doubt in theory obtained plenary power of making "laws" and decrees, but this power has not been used to deprive the executive of the power possessed by it under the monarchy of regulating the administration by executive ordinances. These characteristics have been transmitted through successive constitutions into that now in force. Thus though the legislature in theory has power to regulate the administration by the executive by means of laws, that power has been sparingly exercised, and the executive has been left pretty free to organise the administration in its own way. But on the other hand the legislature through its committees has exercised administrative control much more freely than in England. Lastly the control of the courts, that which the constitutions of the Revolution most strongly reprobated, has at the present day through the development of the administrative courts and improvements in the organisation and position of ordinary courts assumed real importance. Similar developments

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(a) See The Federalist, Nos. 46 & 47.

(b) This is fully discussed in Lecture V. paras 17-18, *infra*. Consult on this point Lowell's Governments and Parties in Continental Europe, Vol. I, pp. 55-57.

## SEPARATION OF POWERS.

have taken place in other countries on the Continent of Europe in which the administration has not been framed on the English Model (a).

The true *rationale* of the doctrine may now be fairly said to be as well appreciated in the countries on the Continent of Europe as in America, England and her Colonies and, as will be shown later, to a certain extent also in India (b).

True *rationale* of the doctrine now everywhere appreciated.

## LECTURE V. MODERN ADMINISTRATIVE FORMS.

### 1—The English and Foreign systems.

1. Constitution, says Luigi Miraglia (c), is to administration what structure is to function. It is an apt simile, and I cannot find another more suitable to describe the relationship.

Constitution and administration.

2. The influence of the constitution on the government can never be regarded with indifference by any student of

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(a) In most other European countries, the importance of making the Judiciary independent of the Executive appears to be now so well recognised as to be embodied more or less completely in their constitutions. The Judiciary enjoys the least independence in Sweden, just as that country is also the one where the Legislature is most dependent on the Executive. See Ogg, *Governments of Europe*, Ch. XXXV.

(b) See Lecture V. paras. 76-78, *infra*. Switzerland, freest of European countries, is also curiously enough the only exception. There, the Legislative Assembly and the Federal Council each exercises all three functions, legislative, administrative and judicial. "In Switzerland, indeed, the separation of powers, although proclaimed in many of the Cantonal institutions, is by no means carried out strictly; and the competence of the different branches of the National Government is such that Dr. Dubs spoke of the system as an organic confusion of powers." Lowell, *Governments and Parties in Continental Europe*, Vol. II p. 195 ff. The reason is that the original communal life of the Cantons has developed without a check in Switzerland by reason of its early acquisition of freedom from Feudalised Europe. The conditions of this country are, as is its history, so peculiar that its institutions and experiences are those which furnish materials for generalisation the least. See Ogg, *Governments of Europe*, pp. 405-429. The Bundesrath in the German Empire compares with the Swiss Federal Council in being a legislative chamber, an executive council and an administrative court rolled in one. It is a highly anomalous institution which will remain an organic element of the German constitution only so long as that Empire remains a Federation of States, an expression of the imperfect union attained by the German nation, not indeed in sentiment but in their political institutions.

In Switzerland and Germany.

(c) Luigi Miraglia, *Comparative Legal Philosophy*, p. 206.

political institutions. It is the structure of the organism that determines its place in the scale of life. But as function begins before structure in the world of life, so in the world of politics, administration begins before the government can have taken a definite shape. Also, governments like organisms, though differing in structure, may yet function alike. Further, a change in structure may not seriously modify the normal functions of the organism.

Absence of  
correspondence  
between  
forms of constitution  
and  
forms of administration.

3. It need, therefore, cause no surprise, if a classification of administrative systems should be found not only not to agree with a classification of forms of government, but actually to cut across it.

4. Constitutionally, England and France belong to the same family, for in both there is a Parliamentary executive. The fact that in the one the head of the executive is a hereditary Prince and in the other a periodically elected President is, essentially, negligible. The German constitution on the other hand approaches the American, for in neither is the executive controlled by the legislature. And yet from the point of view of administration, the United States of America are next-of-kin to England, and France is related to Germany.

Constitution  
of India.

5. The old wine of English administration has been poured into new bottles not only in the United States of America but also in those English Colonies and Dependencies which have not cut themselves adrift from England. The most anomalously constituted of English Dependencies at the present moment is India. India has local legislatures predominantly unrepresentative and controlled by the local executive who themselves are responsible to nobody in India but to a member of the Home Government, who in his turn is nominally responsible to the House of Commons and through it to the English electorate. Really, he is independent of all external control, save what may be exercised by his colleagues in the Ministry, who, it must be remembered, are normally too busy or too indifferent to concern themselves with Indian affairs (a). And yet the administration of India

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(a) The control of Parliament over the Indian administration is proposed to be made more real in the Montague-Chelmsford scheme of Indian constitutional reforms now under consideration of Parliament, by establish-

today, with all its imperfections, may well lay claim to a not unworthy place amongst the administrative systems of the world.

Administra-  
tion of India  
more advan-  
ced than cons-  
titution.

6. Without doubt a rise of a nation in the constitutional scale should make for a rise in the character of its administration. Where it does not, that is clear proof that the constitution is a make-believe, or worse, a sham.

7. Also, as previously indicated, unless a State has attained a certain level constitutionally, there can be no administration according to law. This minimum of structural organisation is implied in two out of the four conditions which were found on analysis to be essential to it, *viz*: (1) separation of the State from the Government (a), and (2) separation of the Executive, Judicial and Legislative organs of the State. Sovereignty of the people, I have shown, is not essential. If it were, there would be no administrative law in India.

The constitu-  
tional mini-  
mum required  
for adminis-  
tration  
according to  
law.

8. Given this basis of structure, administration in modern constitutional governments would represent the life of the State working within it. The character of the administration would depend upon the proportion each of the remaining two conditions bears to the other. Borrowing the language of mathematics, administration may, not inappropriately, be described as a function of two factors, the State and the Individual. It is the predominance of the one or the other that determines the type of the administration. In the English type, it is the Individual who is normally regarded as of paramount importance. In the French (Continental) type, State rights, even in normal times, are regarded as of greater importance than individual rights. The Governments

The two fac-  
tors of admin-  
istration—  
State and  
Individual.

Prevalence of  
one over the  
other deter-  
mines the  
type—two  
types.

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ing a Select Committee of the House of Commons for Indian Affairs and by placing the salary of the Secretary of State for India on the Home estimates. There is a proposal also to appoint periodical committees of Parliament for examination of Indian affairs, in order to advance proposals for further reforms based upon a consideration of the progress made and the possibility shown of further progress under the new scheme of constitutional reforms proposed to be introduced to give effect to the policy, announced on 20th August 1917, of conferring responsible government on India by progressive

(a) See Professor Burgess's Political Science and Constitutional Law, Vol. II, p. 2. The organisation referred to here would appear to correspond most nearly to what Professor Burgess styles Limited Representative (in one word, Constitutional) Government.



of France, Germany, Italy and Austria belong to the latter type; England, the United States of America and the self-governing English Colonies at any rate belong to the former. The Indian administration is really a graft from the English, though greatly modified. So great indeed at times appear the departures from its English proto-type, that the Indian system on some points bears closer resemblance to the Continental than to the English type. The resemblance, however, I shall show later on, is superficial.

Why only  
two.

9. One may feel surprised to note that all these States, so widely placed and of such varied constitutions, should nevertheless belong to one of two, and two types only, of administration. I shall however try to establish that the surprising thing is not that there should be two types of administration but that there is more than one.

Sources : Im-  
perial abso-  
lutism, of one;  
Feudalism, of  
the other.

10. Before the advent of Feudalism, there was in Europe no theory of public law—there was pure and simple State absolutism. What the Government willed was law, and did not admit of being tested by any legal standard binding on it. This in brief was the traditional Imperial theory of administration.

Characteris-  
tics of Feu-  
dalism.

11. Feudalism opposed to it a system in which the place of everyone from the King downward was determined by his relation to the land. The relation between the King and his subjects was in kind not different from that between subject and subject. In point of dignity, no doubt, the King held a place not equalled by any of his subjects and he enjoyed privileges not allowed to any one else (a). But his position in relation to the rest of the community was as much fixed by law as that of any of his subjects. The weakness of Feudalism lay, as previously stated, in the absence of a power to enforce the law which in theory bound ruler and ruled alike (b). That weakness was accentuated by the fact that in the Feudal scheme grants of land almost invariably carried with them grants of jurisdiction. In a community organised on strictly Feudal lines, there would be as many courts as there were seigniories—courts altogether independent of the King and controlled by the seigniors.

Law in abun-  
dance combi-  
ned with ab-  
sence of au-  
thority to  
enforce it.

(a). The *regalia* of the Feudal monarchy.

(b), Sidgwick, Development of European Polity, p. 324, Also, *supra*, p. 17.

12. England was the only country where an authority to enforce the Feudal order was found and it was found in the Royal Courts (a). The circumstances which mainly contributed to this result were the following :—

England, only country where the Feudal order was enforced by monarchy.

I. Through the statemanship of the Norman and Angevin Kings and by a series of measures dating almost from the moment of the introduction of Feudalism into England, the military supremacy of the King over the nobles was firmly established, so that at no time afterwards was the Royal power in England in jeopardy (b). It never became necessary for the King in England to crush Feudalism and to build up Royal power upon its ruins.

II. The Royal power, once it was firmly established, chose to consolidate itself through the Royal courts, rather than through Royal officials (c). This in a Feudally organised society undoubtedly represented the line of least resistance. The process necessarily involved a usurpation by the Royal courts of the jurisdiction of the local courts, often in the teeth of opposition. But it was carried through, without respite or recoil, to completion.

Instrument employed to do so—the Royal Court.

III. The Royal courts were used by the King not merely to “keep the King’s peace” as between subject and subject, but also in order to control and keep from doing wrong administrative officials, “sheriffs, constables, coroners or other bailiffs of the king”, who (as the Magna Carta tells us) were deprived of the power “to hold the pleas of the Crown”,

King’s officers also subordinated to the Royal Court.

(a) Upon this point, the following observation of M. Brissaud will be found instructive. “The Feudal bond was in theory very strong, but in practice it was weak. It was broken in a regular manner by mutual agreement or by abandonment of the fief; but most frequently it was broken by violation of faith either by the seignior or by the vassal, especially by the latter who aspired to independence; so it was not judicial power but war which definitely regulated their respective situations”. It was in England only that judicial power replaced war. Brissaud’s *History of French Public Law*, p. 280. That the principle of Feudalism if capable of enforcement was a principle of liberty, is recognised by Brissaud. *Op. cit.* p. 214—a testimony the value of which will be appreciated when it is remembered that M. Brissaud was not considering the case of England.

(b) That is to say, from attacks by a privileged aristocracy. The remark can of course have no reference to the occurrences of the 17th century.

(c) Lowell, *Governments and Parties in Continental Europe* vol. 1. pp. 48-51.

To use a metaphor, Feudalism, a spirited and somewhat unruly charger, was first broken by the military power of the Norman and Angevin Kings, and then ridden by the Royal judges.

Consequences  
thereof on  
the adminis-  
tration.

13. From this two important consequences followed : (1) Official acts become subject to the scrutiny of the Civil Courts in just the same way as the acts of private individuals and by the same procedure. (2) As courts of law were accustomed to enforcing rules of law and not particular administrative orders, Royal orders addressed whether to subjects or officials had to be framed as laws. Administrative control over officials (as over private individuals) thus came to be largely replaced by legislative control. What administrative control still remained virtually ceased when the administrative functions were transferred to unpaid Justices of the Peace ; and with the abolition, in 1640, of the Court of Star Chamber, the very machinery for exercising such control disappeared. The control which was substituted in its place was the judicial control of the Court of Quarter Sessions and of the King's Bench (a). Administration in the localities thus became, without any conscious working towards that end, decentralised.

The King and  
legislation.

14. Whether things would have been suffered to take exactly this turn if the Norman and Angevin Kings had possessed no legislative power, is open to doubt. But the normal method of legislation at this period was by Royal ordinances. At a time too, when the King could at will make and unmake courts and appoint and dismiss judges, there was no possibility of the action of the Courts hampering the administration. The Royal judges were in fact able to extend their jurisdiction and make their power felt all over the Kingdom, because they proved loyal allies of the King in the work of consolidating his power over against the forces of disorder.

The King and  
the Judiciary

The King's  
prerogatives.

Was it not the King's judges who invented the doctrine, "the King can do no wrong" ? It was they who found for the King that undefined reserve of discretionary powers, which was sanctified by the name of "Prerogative". The Common law laid the foundation in England of both State and Individuals rights. But before the Judges could complete this task, two other conditions had to be satisfied.

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(a). Redlich & Hirst, *Local Government in England*, Vol. I. pp. 19 to 33. *Infra*, Lecture XXIII.

15. IV. The power of making and amending the laws had to be taken away from the King. This change was effected gradually, the power passing by degrees, but in end completely, into the hands of Parliament.

V. The Judiciary, willing agents in the beginning of the Royal will and active promoters of the Royal policy, had to be made completely independent of the King and relegated to the task of administering the law as found, quite irrespective of reasons of policy.

16. As stated in a previous chapter, in course of time Parliament was able to assume control over the Executive also, but during a stormy interval they remained the servants of the King and fought for the King against Parliament. To this fact of history is traceable the jealousy habitually entertained by Parliament and people alike in regard to Royal officials. To this is due the habit which prevents the English legislature from conferring large undefined powers on public authorities whether at the seat of Government or in the localities. This habit is now wearing away. At the same time, the demands made upon Government by modern conditions make it imperative to vest large discretionary powers on administrative authorities, which when exercised by them should not, it is urged, be open to review, at any rate by the litigious procedure of the ordinary Civil Court. Whether this new development will lead to the establishment in England of Administrative Courts on the Continental model is yet to be seen. As things stand, however, the two outstanding features of the existing system of administration in England still are : (i) the subjection of officials generally to ordinary judicial control ; and (ii) administrative decentralisation. Another feature, which will be considered in connection with the topic of Local Government ( and which also appears to be in a similar state of flux), may be mentioned here and that is ( iii ) the absence of anything like local autonomy in local administrative bodies, these bodies being possessed only of enumerated powers conferred within prescribed limits and for specific purposes by special Acts of the Legislature.

17. In France, Royal power was in the beginning not strong enough to check the progress of disruption which seems inherent in the Feudal system, and when it did succeed in

Why English Parliament is habitually opposed to giving unlimited powers to public authorities.

Characteristics of English administration flowing therefrom.

French Monarchy compelled not to fulfil but to supersede Feudalism.

How on the Continent Feudal Courts being allied to Feudalism became suspect of King and people.

Absence of a strong central Royal Court.

Administration why made independent of judiciary.

Continental habit of looking up to administration, rather than to the legislature and law courts for protection, contrasting with English love of law and vested rights.

asserting itself, it could do so only by destroying Feudalism. For this reason too, the French monarchy failed to evolve a central Royal court having jurisdiction over the entire Kingdom. The local and seignioral courts remained strongholds of Feudalism, and the growing strength of the monarchy which alone could save the nation from Feudal anarchy could not suffer itself to be paralysed by the interference of these courts. In this struggle with the forces of Feudalism the monarch, as in England, had the full support of the commonalty, and French local and seignioral courts became and remained suspect in the eyes of the King and the people alike. At the inception of the French Revolution, this traditional jealousy of the French people towards Civil Courts was deepened by their reactionary attitude. This explains the strange uses to which the doctrine of "separation of powers," which since the middle of the 18th century had passed into the currency of political thought on the Continent, was put by the leaders of the Revolution. The administrative authorities were made completely independent of the judiciary and the judges were forbidden on pain of forfeiting their position to interfere in any way whatsoever with the acts of the officers of the administration or to cite them before them for the performance of their duties. This uncompromising hostility to Civil Courts has been qualified in more recent times, but the traditional dislike for judicial interference with administrative acts and measures remains ingrained in the minds not only of the French people but of all people on the European Continent, in every part of which Feudal courts, during the struggle of the Princes with the nobles, had stood out against the former for the privileges of the latter.

18. This development was further aided by the fact that until after the French Revolution no nation on the Continent of Europe (a) was able to turn out a national legislature at all comparable with the English Parliament. The result was that the people on the Continent came to look almost exclusively for protection to Royal authority manifesting itself through the administration. The affairs of the nation were organised not by a watchful Legislature, nor by an all-

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(a) Hungary excepted. Hungary presents an interesting object of study to students of constitutional law.

powerful central Court, but by the King himself through appointed officials, -commissioners and intendants. Not only was no common law developed, laying down the law for princes and people alike, but the French and other nations on the Continent never acquired that passion for law and vested rights which is at the basis of English political and social life. With all their love of liberty and equality in the abstract, and in spite of the most solemn guarantees in constitutions and compacts, no people and no Government on the Continent of Europe can be persuaded to admit the claim of any individual to delay or overturn the public interests in order to redress his own individual grievances (a).

19. Thus arose three general characteristics which (subject to what I may have to say regarding recent developments in France and Germany in local self-government) continue to mark the Continental systems of administration (the French in particular) sharply off from the English:—

Resulting characteristics of Continental administration.

(i) Absence of jurisdiction of Civil Courts over the administrative and political acts of officials.

(ii) Centralisation of administration.

20. The establishment of national legislatures in recent times in all these countries, even in France where the Legislature is constitutionally able (as in England) to control the Executive, has made no difference in the traditional methods of administration, for the Legislatures, in conformity with national habits, refuse to lay down any but general principles and leave almost unrestricted liberty to the administration to work out those principles in practice (by executive ordinances or otherwise). Hence arises a third characteristic, viz:—

Why establishment of national legislatures has been without effect on methods of administration on the Continent.

(iii) The central authorities on the Continent are able to make general grants of power to local authorities which, in consequence, enjoy a measure of autonomy unknown in England, where local autonomy has up till now remained a plant of slow growth owing to the jealousy with which the English Parliament habitually regards all grants of unlimited power.

Local autonomy on the Continent

21. The above organisation of the administration would be hardly distinguishable from the Caesarism which was handed

The origin of the administrative jurisdiction in France.

(a) Lowell, Governments and Parties in Continental Europe, Vol I. pp. 51-54.

down in tradition by Imperial Rome to Medieval Europe. But towards the close of the eighteenth century, this uncontrolled exercise of official power, specially in its lower levels, seriously conflicted with the newly-awakened sense of liberty and equality, the watchwords of the French Revolution. Appeals to the ordinary courts being considered inadmissible, the Constitution of the year VIII (1800) provided a system of administrative appeals from subordinate to higher administrative authorities. This was the beginning of the present administrative jurisdiction in France. Similar jurisdictions grew up in the States of Germany and Italy also. It is of the essence of the exercise of this jurisdiction that the judges should be persons actively engaged in the administration and possessed of administrative experience, and should be free to apply considerations of justice and policy without reference to hard and fast rules of law (a). In the absence of positive law, Administrative Courts on the Continent have developed a body of case-law which is habitually followed as precedent somewhat after the manner of judgments of Civil Courts under the English system (b).

22. Had Feudalism not followed different courses in England and on the Continent, there would not have been at this date in the civilised world two types of administrative law presenting almost diametrically opposed characteristics.

Tendency of  
the two types  
in recent  
times towards  
assimilation.

23. It is worthy of note, however, that distinct and even opposed as the two types appear to be, there has been in recent times a tendency on the part of each to approach the other type, thus practically demonstrating that there are elements of value in each. Considerations of administrative efficiency, which (having regard to modern conditions) is bound to suffer in the English form, have led to an increased centralisation of local administration and to the constitution of local authorities possessing such extensive enumerated powers as tend to make them to a certain extent autonomous. The French and German administrations, on the other hand, besides developing an administrative jurisdiction on judicial lines, have been seeking to replace the control formerly exercised by the

(a). Lowell, *Governments & Parties in Continental Europe*, Vol. 1. p. 56.

(b). Lowell, *Government of England*, Vol. II, pp. 479—80, pp. 497—98.

Central Government over local authorities by an elective lay control thus effecting administrative decentralisation in matters appertaining to the localities.

24. The contrast between the two types of administration is best brought out by the position officials occupy under each system. Officials under the English system can never claim immunity in Courts of law in respect of acts which interfere with private rights, simply on grounds of "reasons of State"—a defence which is always available to the administration in France to take the official acts in question out of the jurisdiction not merely of Civil Courts but of Administrative Courts as well (a). Officials in England must, like private individuals, adduce some rule of municipal law in justification or be held answerable in damages or other penalties imposed by law. Only in such a system, is it possible to lay down that "as between a Sovereign and his subject there is no such thing as an act of State" and "that the warrant of no man, not even the King himself, can excuse the doing of an illegal act" (b). This is the "rule of law" of which English constitutional writers are so justly proud.

The two types as viewed by critics and apologists.

Rule of law.

25. Persons brought up under the English system find it hard to understand how individual rights and liberties can be adequately protected where ordinary Civil Courts are precluded from examining the legality of official acts, and where such acts, if allowed to be reviewed at all by any tribunal, must be reviewed by tribunals consisting of persons actively engaged in the work of administration and who cannot, therefore, in the very nature of things, be free from official bias. It is urged, however, by the apologists of the Continental type of administration, that the validity of acts of the administration cannot be properly determined by the application of abstract principles of justice as between man and man, but must be considered from the broad standpoint of public policy which is lost sight of by judges habitually dealing with questions of private law. This standpoint, they say, can be present only to the minds of persons actively engaged in the work of administration, and

(a) Lowell, Government of England, Ch. LXII.

(b) *Sands v. Child and others* (1808) 3 Lev. 352; *Raleigh v. Goschen* (1898) 1 Ch. 78.



it is urged that the extreme legalism of the English system tends to sacrifice public to private interests.

25. This criticism of English political theory loses much of its force when it is remembered that English law courts and the Parliament have seldom denied to the administration powers which it cannot well do without in the public interest. The prerogatives of the Crown (now exercisable only through Ministers responsible to Parliament) are in fact viewed as part of the Common law of England, and although the authority of the Legislature to modify, regulate or repeal it is no longer questioned, like other rules of Common law, prerogative is not presumed to be altered by statute, and is not affected otherwise than by express provisions to that end contained therein (a). English law courts have moreover shown the greatest hesitation in interfering with the exercise of a discretion vested in public officials by the Legislature (b). The tendency noticed in recent English, American and Colonial legislation to vest large discretionary powers in Official Boards and Commissions, seriously affecting the rights and liberties of the subject in all conceivable directions points rather to the necessity of not restricting but supplementing such judicial control as at present exists by the creation of Administrative Courts charged with the duty of reviewing the exercise by Official Boards and Commissions of a discretion which the ordinary Civil Courts appear to be powerless to correct (c).

Need for developing an administrative jurisdiction in the English system to fulfil the "rule of law." ●

(a) Craies, *Statute Law*, 1907. p. 351; Halsbury, *Laws of England*, Vol. VI. part V., specially p. 374; also Vol. XXVII, p. 161; Broom's *Legal Maxims*, 7th Edn. pp. 56-59.

(b) For a recent exposition of the relation of the court to administrative authorities charged with discretionary powers, see *Board of Education v. Rice*, (1911) A. C. p. 179 at p. 182 (1911); Halsbury, *Laws of England*, Vol. XXVII p. 176. *Infra*, Lecture XXIII, paras 37-40.

(c) Upon this subject, ex-Senator Root of the United States of America, lawyer and practical politician, recently said: "There will be no withdrawing from these experiments. We shall expand them whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong-doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislation and courts. Yet these powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong." The remedy, the Senator suggests, lies, in "regulating these agencies of regulation." He asks "that the rights of the citizens against them be made plain and a system

27. After what has been said before of American administration, an independent analysis of that administration seems hardly called for in a consideration of "types" of administration. It belongs to the English type, and all that need be said of it in the present connection is that, in this system, individual rights are more strongly entrenched than in the English, because, in the first place, the Legislature is not supreme, being bound by a written constitution which has embodied in it a large bill of rights. Secondly, because owing to the limits placed by the constitution on the powers of the Legislature as well as of the Executive, the Supreme Court (and in lesser degrees the other Courts) which have to interpret the constitution have come to be constituted into arbiters between State and private rights. The "legalism" of the American administration is thus more pronounced in appearance. But the American Courts have been far from unmindful of public interests in their interpretation of the constitution. The Supreme Court has been able, by a liberal interpretation of it, to uphold the constitutionality of statutes conferring large prerogative powers on the Executive authority under the denomination of "police power" (a). Subject to what has been just stated, the American administration possesses all the three characteristics of the English administration in an even more accentuated form. For reasons which will be discussed in their proper place, administrative centralisation of local authorities has made little progress in America and the Legislative control of the Commonwealth Legislatures has had a tendency to degenerate into legislative tyranny.

American administration.

Special features.

"Police power."

28. The only Continental systems, besides the French, which need be referred to in this examination of types are those of Germany, or rather of Prussia, and of Italy.

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of administrative law (which in America is still in its infancy, crude and imperfect) be developed". Elihu Root, *Government & Citizenship*, pp. 531-535. So there is a near chance of English and American administrative law taking a leaf out of the French and German which would thus be repaying debts which they owe to the former in the matter of local independence. Even opposing systems must in these days of interchange of ideas inevitably assimilate each other's institutions. For a fuller treatment of the whole subject, see Lectures XII and XXIII *infra*.

(a) Burgess, *Political Science and Constitutional law*, Vol. I, pp. 211 to 217. *Infra*, Lecture XXI, paras 10-13 and footnote to para 13; also Lecture XXII, paras 14 etc.

29. The administrative systems of the smaller German States need not be considered, for, until the establishment of the Prussian hegemony, they generally followed the French model, and after it many of them have been largely influenced by the example set by Prussia. The importance of the Prussian administrative system as a subject for comparative study cannot be exaggerated. More constructive thought and foresight have been expended on it than on any other system of administration—not excluding even India, which itself is in some respects a triumph of constructive organisation.

Prussian system, a recent treatise of constructive statesmanship.

A historical retrospect.

English influence—Stein and Gniest.

30. In Prussia, Feudal rights and privileges continued in existence until well into the 19th century. The Prussian monarchy was, from its foundation by the Great Elector, military. The disparate units of the community were kept together by a bureaucracy, backed by an army. It hardly deserved the name of civil administration. The system, such as it was, broke down completely after the defeat of the army by Napoleon at Jena (1806). It was then that the authorities awoke to the necessity of rebuilding the Government on national foundations. The new minister Stein deliberately set himself to make the administration subservient to the general well-being of the community. To that end serfdom was abolished and land was made available by purchase to persons not of noble blood. The abolition of the hereditary magistracy came later. The landed interest is still very powerful in the Prussian administration, but its special privileges have been progressively narrowed. The form of administration which was established was, as it could not but be, Continental, but it was deliberately leavened (first in 1808 and again in the seventies of that century) by ideas borrowed from the English administration. Stein and Dr. Gniest, who were respectively responsible for the reforms of 1808 and 1872, were both students and admirers of English institutions. Local self-government in cities and rural communities has been fostered first under strong official tutelage and later on by handing over a large part of the control to local bodies which in their composition are predominantly elective and lay. Civil and administrative courts have been reorganised in such a way as to assure to the judges in either kind of courts both independence and certainty of tenure. The details of these several elements of the present

administration will be considered in their proper places. The results, in so far as they are material to the present discussion, may be broadly summarised as follows :—

- (i) Except in matters in which jurisdiction has been specially conferred on them by statute, the ordinary Civil Courts have no jurisdiction to pronounce on the legality of official acts or measures.
- (ii) Complaints against public authorities in matters affecting individual rights (and in some few cases, interests) may, when allowed by law, be taken by the persons aggrieved to Administrative Courts, acts of public authorities which do not affect private rights being subject only to the executive control of superior authorities.
- (iii) Except in the highest Administrative Court which is wholly composed of salaried professional lawyers, Administrative Courts are presided over by unpaid elected judges who are also actively engaged in the work of the administration. The tenure of the judges in all the Courts is independent.
- (iv) Public authorities, whether central or local, exercise authority by executive delegation from the seat of the Government, and their powers and functions not being defined by the Legislature, the local authorities enjoy a larger measure of autonomy in local matters than in England and in the United States, and being, after the reforms of 1872, in their composition predominantly elective and nonprofessional, are in local matters decentralised.

31. The Prussian administration, as already stated, represents a deliberate and, apparently successful, effort on the part of a benevolent autocracy to construct a new system of administration on national lines upon the frame-work furnished by the Continental system out of materials borrowed from both the Continental and the English systems (a).

32. The Italian system resembles the Prussian in this that it too is a construction by statesmen and not a product of natural evolution. It has been described by an acute observer

Italian administration also created by statesmen.

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(a) Lowell, Governments & Parties in Continental Europe, Vol. I. pp. 294-297 and pp. 319-327

Illogical attempt to reconcile English & French ideals.

A centralised administration set up on the French model.

Cannot do without Administrative Courts.

Special features.

as an attempt to establish a compromise between the English and French systems and by no means a successful one. With a strong leaning towards English institutions, the statesmen of the Union between 1860 and 1870 were faced with a situation which made a powerful centralised administration a necessity. In spite of a long bill of rights embodied in the constitution, the administration which was copied from the French assumed highly arbitrary powers to interfere with private rights. But with characteristic want of foresight all Administrative Courts of the Ducal regime were incontinently abolished and ordinary Courts given exclusive jurisdiction over criminal prosecutions and all civil cases in which a civil or political right was involved. But this apparent concession to individual rights was illusory, for the Council of State, an official body, was given exclusive jurisdiction to decide whether a civil or political right was involved or not, and in practice the Council of State showed no inclination to find that such rights were involved where the administration appeared to have acted in a high-handed way. In fact, there being no Administrative Courts, the officials did what they liked without check or control. This intolerable state of things was partially remedied in 1877 by the transference of the jurisdiction in the decision of conflicts from the Council of State to the Court of Cassation in Rome, and in 1889 and 1890, by the establishment of Provincial Administrative Courts, in part appointed (in France they are wholly appointed) and partly elected (in Prussia they are wholly elected). A section of the Council of State, the members whereof were made virtually independent, was erected into the highest Administrative Court.

33. The net result of these reforms appears to be that the Italian administration resembles in its general features, and in most even of its details, the French, with this difference, that the Civil Courts have a larger jurisdiction over official acts in so far as they may infringe private rights, the jurisdiction of the Administrative Courts being limited to the protection of private interests. It is in fact possible in Italy for the same act to come before both Courts (a).

34. The differentiation in type between the English and the Continental systems of administration has, I believe, been sufficiently illustrated by the foregoing instances drawn as well from countries where the administration has developed by natural evolution ( England and France ) as from countries where the system has been more or less a work of art ( the United States of America, Germany and Italy ). It is not necessary for this purpose to examine other instances. But to show how inveterate and widespread have been the separation of administrative from ordinary law and the institution of Administrative Courts on the Continent, I only mention here the fact that Administrative Courts exist in countries presenting such extreme contrasts as Austria and the recently established Republic of Portugal. Switzerland has no special Administrative Courts, but the distinction between ordinary and administrative law is recognised in its constitution, and administrative jurisdiction is shared partly by the Federal Tribunal and partly by the Federal Assembly. Art. 154 of the Dutch Constitution lays down that Administrative Courts must be established by law, and Art. 61 of the Constitution of Japan provides that no suit which relates to rights alleged to have been infringed by the illegal measures of the executive authorities and which should come within the competence of Courts of administrative litigation, specially established by law, shall be taken cognizance of by a Court of law. Little Belgium is an instance of constructive work in the field as well of constitution as of administration. Its constitution was modelled on that of England but its local administration has always been of the Continental type. But it has no Administrative Courts, and with greater courage than was shown by the Liberators of Italy, it has given ordinary Courts full jurisdiction to try officials and review acts of the Government at the instance of aggrieved subjects (a). In Spain, the administration whereof follows the French model, cases involving matters of administrative law formerly decided by the Provincial Councils and the Council of State are now disposed of by the ordinary Courts, the Fourth Chamber of the Supreme Court being vested

Prevalence of administrative jurisdiction on the Continent of Europe & Japan.

Its absence in Belgium.

(a) Lowell, Governments and Parties in Continental Europe,, Vol. I, p. 171 n. Grice, Local and Central Finance, p. 196.

with supreme jurisdiction in these matters.' In the Republican Constitution of Portugal of 1911, local administration as in Belgium is organised on the traditional Continental model, and administrative tribunals are maintained to revise acts of its public officials at the same time that ministers and other officials have been made triable before ordinary Courts (a).

35. To complete the treatment of the present topic it remains only to examine the Indian system.

## *II. The Indian Administration.*

36. I make no apology for descending into greater detail in dealing with the Indian administration.

Indian administration a result of constructive statesmanship.

37. Constructive statesmanship has had greater play in determining the form and spirit of the Indian administration than it had in the evolution of the English and the French. The number and variety of "stubborn facts" with which Anglo-Indian statesmanship has had to contend have been larger and more complicated than had ever to be faced by either Prussian or Italian statesmen. The wonder is not that the Indian administration is not as perfect as it might have been, but that it is as good as it is. To be able to do justice to this administration, one must form some idea of the kinds of administration which obtained before the establishment of British rule.

Its predecessors in history.

(i) In Hindu India.

38. The art of government was not unknown in Hindu India, and the duties of the King (b) and other organs of the State are laid down in ancient Hindu literature with a minuteness of detail which, it may be safely said, cannot be found in the ancient literature of any other country ; and no wonder, since laws were made in Hindu India, for the King and people alike, by an aristocracy of intellect who had specialised in that art. But the machinery to enforce these laws, so far as they applied to the King, was wanting. The laws addressed to the King had therefore no greater force in practice than moral injunctions. Thus although Hindu polity

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(a) Lowell, Governments and Parties in Continental Europe ; Ogg, Governments of Europe ; Dodd, Modern Constitutions.

(b) Monarchy of a centralised type was the normal though not the only form of Government known in Ancient India.

fully grasped the truth that the State existed for the people and not the people for the State, it never was able to develop a system of administrative law. The Mahabharat says in one place that if the King failed in his duties, any person, no matter to what caste he belongs, may wield the sceptre of Government. "If the King is an enemy of virtue, morality and power and is unrighteous in conduct," says the Sukraniti, "the people should expel him as a destroyer of the State" (a). In other words, the only remedy for misgovernment, the lawgivers in Hindu India were able to suggest, was rebellion.

39. The King in the Islamic State, who took the place of the Hindu King, likewise found his duties prescribed for him, but as in Hindu so in Islamic polity, there was no legal provision for the correction of misgovernment. The only remedy here again was rebellion (b).

(ii) Under Mahomedan rule.

40. The historical cause (c) which brought administrative law into India is the advent of British rule.

Inauguration of British administration.

41. The way in which that rule was inaugurated in India was certainly far from favourable to the development of administration according to law, for in taking over the Dewani of Bengal, the East India Company was, in the view at least of the parties to that transaction, accepting the position of an official under the Moghul Emperor and, as Dewan, could lay claim to the exercise of the unlimited prerogatives of the Moghul rule. Fortunately for India, however, the Company depended for its legal existence upon periodically renewable charters of the British Parliament, and the way in which the Parliament viewed the acquisition of political power by subjects of the Crown was well expressed by the elder Pitt when he declared from his place in Parliament that no subjects could acquire sovereignty of any territory for themselves but only for the nation to which they belonged. The Company too, even if at any time it did entertain a desire to cut itself adrift from the British Parliament, was compelled by

The Company's claim to unlimited prerogative as representing the Moghul Emperor.

Whether consistent with subjection to Crown and Parliament.

(a) Pramatha Nath Banerjee's Public Administration in Ancient India, Ch. VII.

(b) D. S. Margoliouth's Mahammedanism, p. 96; Hamilton's Hedaya, Edn. 1791, Vol. II. Bk. IX, Ch. X.

(c) See Lecture I (ii) *supra*, para 23.



mis-management of its affairs in India and its financial embarrassments to turn more and more to Parliament for help and succour.

The Regulating Act of 1773.

How misunderstood.

42. In 1773, barely eight years after the acquisition of the Dewani, the affairs of the Company appearing to be in hopeless confusion, Parliament set itself seriously to organise it, and it proceeded to do so in characteristic fashion. Anglo-Indian political writers (a) cannot find words strong enough to condemn Lord North's Regulating Act of 1773. The mildest of its critics declares it to be a fatuous piece of legislation which very nearly lost to England the infant Indian Empire, as another measure of the same Ministry was soon to lose for her her American Colonies. They overlook the fact that the British Parliament in 1773 had not only no experience in the governance of a dependency, it did not even suspect that there was a dependency to govern from England, for it had not yet fully realised that by its acquisition of the Dewani, the Company had already in fact become territorial sovereign of "the Kingdoms and Provinces of Bengal, Behar and Orissa". The matter which had attracted its attention was the wealth and ostentation of the returned servants of the Company who, it was suspected not without reason, had made themselves rich by abusing their position as servants of the Company. It was to remedy these suspected abuses that the Regulating Act was chiefly passed, and that Act certainly represents the best of the then known methods of remedying such abuses.

Its genesis.

Its provisions.

The Governor General and Council.

43. By this Act, the three Presidencies, heretofore independent, were placed under the general control of the Governor of Bengal henceforth styled the Governor General. But as everybody connected with the Company was suspect, the executive power was vested in a Council of five of which the Governor-General was but one. "The Governor-General and Council" as the Council was styled were in their turn placed under the Court of Directors in England whose orders they

(a) Rev. W. K. Firminger's edition of the Fifth Report, 1812, with its learned Introduction, had not appeared when the above was written. It is gratifying to find my reading of the Regulating Act substantially confirmed by an author who has made a special study of the subject. See Ch. XIII. of his Introduction. Edn. 1917 (Messrs Cambray & Co.)

were to obey. It was the Court of Directors who were directly responsible to the Parliament for the proper conduct of the Company's affairs in India. But about the most characteristic provision of the Statute was the one establishing a Supreme Court at Fort William "with jurisdiction civil, criminal, admiralty and ecclesiastic, over all British subjects (a) who should reside in the Kingdoms and Provinces of Bengal, Behar and Orissa or any of them under the protection of the Company, having full power to hear or determine all complaints against any of His Majesty's subjects." The Governor-General and his colleagues of the Council were the only Europeans personally exempted from its coercive jurisdiction but they as well as the Judges of the Supreme Court might be tried and punished by the Court of King's Bench in England for any offence against any of His Majesty's subjects or any of the inhabitants of India. The Governor-General and Council were authorised to make and issue such rules, ordinances and regulations for the good order and civil government of the Company's settlement at Fort William and the subordinate factories and places, as should be deemed just and reasonable and should not be repugnant to the laws of the Realm and to set, impose, inflict and levy reasonable fines and forfeitures for their breach, but these rules and regulations were not to be valid until duly registered and published in the Supreme Court with the assent and approbation of that Court.

The Supreme Court.

44. As I have already indicated, the Parliament when it passed the Regulating Act did not suspect that the "Kingdoms and Provinces of Bengal, Behar and Orissa" had ceased to exist, and it had no idea that the Company was already sole sovereign of this territory. The acquisition of the Dewani by the Company seems to have suggested to the minds of its framers but increased opportunities, on the

The Regulating Act sought to extend English public Law to acts of the Company's officials in India through the Supreme Court.

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(a) It was characteristic of the British Parliament in 1773 not to assume that the territory administered by the East India Company as Dewan was British territory. Accordingly it did not regard Indians whether resident in or outside Calcutta as "British subjects" which expression in the present context means European British subjects. The question whether natives of India were or were not British subjects, was, it is said, not finally placed beyond doubt until the transfer of government from the Company to the Crown, in 1858. Halsbury, Laws of England, Vol. X, p. 588.

part of the Company's servants, of oppressing the native inhabitants of the country under colour of office. What better machinery could be thought of for checking these abuses than a Supreme Court strictly enforcing the laws of England or rules framed in conformity with those laws and approved by the Supreme Court itself against the European and Indian servants and agents of the Company ?

Extension premature. Conflict between Supreme Court and the Company.

45. The Supreme Court too did not show any disposition to disappoint the expectations of its founders, and small blame to it, if it failed to fall in with the plans of the Empire-builders in the Company's service. At the same time, it has to be conceded that the chastening atmosphere of an English law Court is not the one best calculated to foster the growth of a nascent empire. The conflict between the Supreme Court and the Company's servants which followed immediately was in the circumstances inevitable. The Moghul sovereignty behind which the Company sought shelter from attacks by the Supreme Court was indeed no more than a shadow. But "it was a shadow", as Ilbert remarks (a), "with which potent conjuring tricks could be performed. Whenever the Company found it convenient, they could play off the authority derived from the Moghul against the authority derived from the British law and justify under the one proceedings which it would have been difficult to justify under the other. In the one capacity the Company were the all-powerful agent of an irresponsible despot, in the other they were tied and bound by the provisions of Charters and Acts of Parliament."

"Moghul sovereignty."

Conflict really between absolutism and "rule of law."

46. Thus at the very inception of British rule, British Indian administration presents itself as a conflict of two opposing principles—the English principle of legislative supremacy with statutory and judicial control of governmental powers and Moghul absolutism (b). The history of British adminis-

(a) Ilbert, *Government of India*, 2nd Edn. pp. 51-52.

(b) It might be imagined that the ghost of Moghul sovereignty had been finally laid in 1858. But that appears to be a mistake. Anglo-Indian writers do not seem to be satisfied with the very extensive powers which Parliament has in terms conferred on the Government of India, nor even with the large additions to it made by Anglo-Indian judges on the principle that the Governor-General in Council as representing the Crown in India possesses in addition to any statutory powers such of the powers, privileges

tration in India is the history of the progressive re-adjustment of these two principles to suit the changing requirements of the times.

47. The Regulating Act of 1773 did not, it is clear, recognise this latter principle even if it be assumed that Parliament at this date had any suspicion of its existence. So long as the Act remained in force, the Supreme Court which would and could not recognise any Court not established by Parliament proceeded to mulct even members of judicial tribunals established in the Mofussil by the Company as Dewan in fines at the instance of native Indians affected by their decisions. The Supreme Court likewise claimed power to arrest and try the native officers of the Company employed in the collection of revenue outside the Company's settlements and factories—including "landholders and farmers of land and of land-rent" for corrupt and oppressive acts done by them in their official capacity, they being in the opinion of the Supreme Court merely servants of the Company.

Details of the conflict.

48. Against these exercises of the Supreme Court's jurisdiction which undoubtedly tended to hamper and dislocate the administration in the Provinces, the Company offered strenuous resistance. Parliament was again appealed to, and after an elaborate inquiry it passed the Amending Act of 1781, which definitely recognised the sovereign attributes of the Company and which placed important limitations upon the jurisdiction of the Supreme Court to control administration outside the Presidency Town.

The settlement of 1781.

Sovereign powers of the Company recognised.

49. First, the Governor-General and Council of Bengal were not to be subject jointly or severally to the jurisdiction of the Supreme Court for anything counselled, ordered and done by them in their official capacity. Secondly, the Supreme Court was not to have or exercise any jurisdiction in matters

Mofussil administration separated and handed over to Company and its officials.

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and immunities appertaining to the Crown as are appropriate to the case and consistent with the laws in force in India. They claim on behalf of the Government of India additional powers, rights and privileges derived, not from the English Crown but from the Native Princes of India whose rule it has superseded. As illustration is cited the fact that the rights of the Government in respect of lands and minerals in India are different from the rights of the Crown in England. It is in reliance upon this theory that Government has refused to allow land revenue to be treated as tax. Ilbert, Government of India, 2nd Edition, p. 177.

Revenue administration freed from control of the Supreme Court.

Company's Courts.

Legislative power of Governor-General & Council in the administration of the Mofussil.

Importance of the settlement of 1781 in the history of the administration.

concerning the revenue or concerning any act done by them in the collection thereof according to the usage and practice of the country or the regulations of the Governor General and Council. The jurisdiction of the Supreme Court over actions and suits was virtually confined to disputes arising between the inhabitants of Calcutta (a) and the jurisdiction of the Company's Courts, local as well as appellate, in matters arising in the Mofussil, was recognised, the highest appellate Court being made a Court of Record whose judgments like those of the Supreme Court were made final and conclusive except upon appeal to his Majesty in Council, and it was this Court which was empowered to hear and determine all offences, abuses and extortions committed in the collection of revenue, and it was expressly provided that no action for wrong or injury was to lie in the Supreme Court against any person whatsoever exercising any judicial office in any Country Court for any judgment, or order of the Court nor against any person for any act done by or in virtue of the order of the Court.

50. Further, the Governor-General and Council were empowered "from time to time to frame regulations for the Provincial Courts and Councils" which, unlike the "rules, ordinances and regulations for the good order and civil government of the Company's settlement at Fort William and the subordinate factories and places", were not required to be in consonance with the laws of England and did not depend for their validity upon registration or approval by the Supreme Court and which were to remain in force unless disallowed or amended by the King-in-Council (b).

51. From the point of view of administration the Act of 1781 is of the highest importance—more important even than Pitt's Act of 1784 which determined the constitution of the Government of India—since it laid down the lines on which the Indian administration was to develop during the

(a) The jurisdiction of the Court over all "British subjects" (meaning by that expression European British subjects) residing in the Provinces of Bengal, Behar and Orissa was thereby not withdrawn, and, excepting so far as the same was subsequently modified by legislation, remained.

(b) Local administration in Madras and Bombay was organised on similar lines in 1800 and 1807 respectively.

next century (a). The Company, under it, had to abandon its pretensions to prerogative power derived from the Great Moghul, but it got back very nearly the same powers under a Parliamentary grant or title. But the fact that these powers it now derived from the British Parliament made all the difference in the world in the theory and practice of the administration.

52. The Act of 1784 created the Board of Control through which the Home Government became responsible for the good government of India, and accountable for it to the British Parliament which has ever since remained the legal sovereign of India, the Court of Directors who were allowed to retain the patronage of India being placed in all matters of administration under the Board of Control.

Pitt's India  
Act of 1784.

53. The combined effect of the Acts of 1781 and 1784 was to constitute the Governor-General and Council absolute rulers of the territories outside the Presidency towns, subject only to the administrative control of the Court of Directors and of the Ministry in England. A statute of 1786 by giving the Governor-General power to overrule his Council practically handed over the supreme executive authority in India to one person, the Governor-General. It became customary from 1786 onward to appoint Governors-General as a rule from noblemen with administrative experience in England. It may be taken for granted that no Governor-General brought up in the traditions of British political life would have seriously abused the extensive powers concentrated into his hands. It is nevertheless permissible to assume that no ruler could have made a wiser use of these powers than did Lord Cornwallis. The Regulations which were matured and published under his auspices bear witness not merely to his political wisdom, breadth of view and high administrative capacity, but also to the unfailingly high purpose which animated his administration. The foundations of the Indian administrative system were in fact laid during this period.

Act of 1786.  
Governor-General made  
absolute in  
Mofussil ad-  
ministration.

54. There appears to have been little or no change in the spirit or the methods of the administration from 1786 to 1813.

Charter Act  
of 1813. In-  
dian subjects  
of the Com-  
pany re-  
cognised as  
subjects of  
the Crown.

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(a) The importance of the statute has apparently been overlooked by Professor Ramsay Muir, who omits it from his excellent little compilation of "Historical Documents Illustrative of the Administration in the Days of the East India Company."

The Company's charter was to expire in the last mentioned year and in view of its renewal the most searching inquiry that had yet taken place into Indian affairs was caused to be made. The native inhabitants of the territories governed by the Company could not well be denied the status of British subjects without denying the sovereignty of the British Crown. What were the obligations of the Crown towards them, if they were not subjects? Was it safe to leave the Government of the Indian territories in the hands of a corporation which had exclusive trading interests in those territories? European subjects of his Majesty, who were subject only to the jurisdiction of the Supreme Court and over whom, as already indicated, the executive control of the Governor-General also sat very lightly, could hardly be made to account for acts of oppression or worse committed outside the Presidency towns. The Charter Act of 1813 marks a stage of progress in constitutional development, for it definitely asserted the "undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the Company's territorial acquisitions in India. The Native Indian population of those territories being thus impliedly admitted to be subjects of the Crown, the Parliament marked the sense of its obligation to them as such by directing that one lac of rupees in each year be "set apart and applied to the revival and improvement of literature and the encouragement of the learned native of India and for the introduction and promotion of a knowledge of the sciences amongst the inhabitants of the British territories in India". The Company itself was deprived of its trading monopoly in India. The Local Governments obtained power "to impose taxes on persons subject to the jurisdiction of the Supreme court and to punish for nonpayment", and Justices of the Peace were given jurisdiction in cases of assaults and trespasses committed by British subjects on natives of India and in cases of small debts due to natives of India. Local Civil Courts obtained jurisdiction over "British subjects" residing or trading or occupying immovable property more than ten miles from a Presidency town and provision was made for the trial of British subjects residing beyond the same limits for criminal offences.

First attempt to bring European British subjects under the same jurisdiction as Indians.

Charter Act of 1833.

55. The Charter Act of 1833 marked a further step forward in the direction of equalising "British" and "Indian"

subjects before the law, and of assimilating the administrative systems of the Presidency towns and the Provinces. But it also effected an important change in the administrative machinery. It affirmed in the first place more unequivocally than had been done before that the Company was allowed to hold the Indian possessions for another term "in trust for His Majesty, his heirs and successors for the service of the Government of India". By it too the East India Company ceased to be a trading company. By sec. 87, it declared that no native of India nor any natural born subject of His Majesty resident there was, by reason only of his religion, place of birth, descent, colour or any of them, to be disabled from holding any place, office, or employment under the Crown. More important than even these, from the point of view of administrative law, was the establishment of a Legislature distinct (in however small a degree) from the executive. The Legislative Council was to consist of the members of the Executive Council and a law member who was not to be one of the Company's servants. The legislative powers of the Local Governments in Madras and Bombay were withdrawn and the new Legislature was empowered to make laws and regulations for *all persons*, whether British or Native or foreigners or others, and for *all Courts of Justice* (including the Supreme Courts) laws which did not require the *imprimatur* of those Courts and which, subject to disallowance by the Court of Directors acting under the Board of Control, were to have effect as Acts of Parliament; for the provision in the Regulating Act, maintained by the Statute of 1781, that Regulations made by the Governor-General and Council for the Company's settlements at Fort William should not be repugnant to the laws of England was abrogated. It was at the same time generally provided by sec. 43 of the Act of 1833 that the laws and regulations to be made by the Governor General in his Legislative Council were not in any way to affect any prerogative of the Crown or the authority of Parliament or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon depended in any degree the allegiance of any person to the Crown of the United Kingdom or the Sovereignty or dominion of the said Crown over any part of the said territories. Except for the fact that under later Statutes, it has been declared that no

Equality of Indian and British subjects before the law and assimilation of Mofussil and Presidency administrations.

The first Legislative Council in India.

Its jurisdiction.



law passed in India is to be considered invalid only because it affects the Royal prerogative, the above restriction on the powers of the Indian Legislatures (among others) has been maintained to the present day. The power which the Act of 1833 gave to the Indian Legislature to make laws for the European and Indian subjects of the Crown alike was exercised almost immediately by Act XI of 1836, in order to make European British subjects amenable to the jurisdiction of the Company's Civil Courts to the same extent as the Natives of India. The inequalities of jurisdiction and, in some degree, of laws in the matter of criminal trials have not even yet disappeared, the last attempt in that direction made during the viceroyalty of Lord Ripon having failed owing to the opposition of the Europeans.

Position in  
1833.

56. Thus, except for the fact that the Supreme Courts were maintained, the form of administration sought to be set up by the Regulating Act disappeared, being superseded, even as regards the Presidency towns, by the form brought into existence by the amending Act of 1781 for the Provinces. That administration however had in the interval been liberalised in spirit by the recognition of the status of Indians as equal subjects of the Crown with the British, by the abolition of the trading privileges of the Company which was responsible for the good government of the Indian territories and by the establishment of a Legislature differentiated from, and capable of laying down the law for, the Executive. Progress subsequently made in the organisation of a Legislature in India differentiated from the Executive has, as may be surmised and as I shall show presently, an important bearing on the evolution of the administrative system of India. It will be convenient, however, for the present not to allow attention to be diverted from the organisation of the Executive. I shall therefore pass at once to the changes effected by the Government of India Act of 1858.

Subsequent  
progress in  
the organisa-  
tion of the  
Legislature  
to be con-  
sidered later.

Government  
of India Act  
of 1858.

57. By that Act, the East India Company ceased to have any part or share in the Government of India. The change is popularly described as direct assumption by the Crown of the Government of India. Students of English constitu-

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(f) But only (as will appear later) with the previous consent or acquiescence of the higher executive authorities.

tional law will not allow themselves to be misled by this description. The question whether the Crown might in 1858, and may now, govern India by prerogative Orders in Council may not be altogether free from doubt (a). But whatever may be the strength of the technical arguments in favour of the Crown still possessing such power, it may be safe to presume that it will never be exercised. The power has been consistently exercised by Parliament ever since, at least, 1781, and there are weighty reasons for urging that the Crown's power in this respect has been lost by desuetude. The so-called transference of the Government of India from the East India Company to the Crown has therefore in no way altered the relations of the inhabitants of British India with the Crown.

Assumption  
of Govern-  
ment by the  
Crown,  
meaning of.

58. What happened in 1858 was that the rapidly diminishing control of the Company as represented by its Court of Directors over the personnel of the Indian administration was removed altogether, because the interposition of this body (retained in Pitt's Act of 1784 as a concession to vested rights) in the Government of India not only added needless complications to the administrative machinery but made for administrative inefficiency. The powers severally exercised by the Board of Control and the Court of Directors were transferred to a member of the British Cabinet, the Secretary of State for India, but he was provided with a Council to be composed of members who were not to be capable of sitting or voting in Parliament and the majority of whom were to be persons who had served or resided in India. The Council was in the main to be a consultative body, but in a number of matters—one of them being the appropriation of the revenues of India, the opinion of the majority was made binding on the Secretary of State. But the decision of the majority even in such matters is not binding on the House of Commons; it may be overruled by the Secretary of State if his opinion is supported by the Government (b).

Its real effect:  
Exit the East  
India Com-  
pany.

The Secretary  
of State for  
India and  
his Council.

(a) See *Campbell v Hall* 20 St. Tr. 239, and Sir Henry Jenkyns's *British Rule and Jurisdiction Beyond the Seas*, Ch. V.

(b) Iyengar's *Indian Constitution*, Second Edition, Ch. III, "The Crown and the India Office." The position of the Secretary of State's Council is in effect not unlike that of the Council of State in France. See Lecture IX *infra*, paras 45-46.

Powers of the Secretary of State for India statutory but apparently unlimited.

59. As a consequence of the transfer of the powers of the Board of Control to the Secretary of State, the Secretary of State retained power to "superintend, direct and control all acts, operations and concerns which in any way were related to or concerned the government or the revenues of India." The superintendence, direction and control of the civil and military government of British India remained, as provided in earlier statutes, vested in the Governor General of India in Council, but the Governor General in Council was required, as a result of the transfer of the powers of the Court of Proprietors under the Regulating Act to the Secretary of State, "to pay due obedience to all such orders as he might receive" from the latter.

Relations of the Secretary of State to the Governor General in Council,

60. The organisation of the Government of India as outlined above has remained unaltered up to the present time. In 1870, the question arose as to what were the exact relations of the Governor General in Council and the Secretary of State for India. Did the former possess independent powers subject to the veto of the Secretary of State, the right of initiative resting entirely with the Government of India—or was it only the agent and adjunct of the Home Government? It was ruled that the Government of India was merely the agent of the Home Government and bound to carry out the Secretary of State's mandates not merely in matters of administration but in matters of legislation also. "The Government of India," it was laid down, "were merely executive officers of the Home Government who hold the ultimate power of requiring the Governor General to introduce a measure and of requiring also all the official members of the Council (in India) to vote for it" (a).

Position of the Secretary of State for India in theory and practice.

61. In theory, therefore, it is the Home Government which is ultimately responsible for the Government of India and is answerable for it to the House of Commons and through it to the British electorate. In practice, however, the Home Government has very little time or inclination to look into Indian affairs and the Secretary of State is normally left to order these affairs according to his own judgment. The British electorate cannot possibly interest themselves in Indian

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(a) See Despatch dated the, 24th Nov. 1870, quoted in Iyengar's "Indian Constitution," p. 35.

affairs, and the salary of the Secretary of State not being on the British estimates the House of Commons (which too cannot ordinarily interest itself in Indian affairs), even if inclined, can do nothing to influence the methods of government in India (a).

62. The autocratic powers which the Secretary of State for India is thus enabled to wield with reference to the Government of India are however, in their exercise, inevitably limited by (i) the circumstances of his tenure of office, and (ii) the fact that no person however able or masterful can rule a distant empire of the dimensions of India from Whitehall.

Practical limitations to his powers.

63. With other ministers of the Crown in England, the Secretary of State for India shares the disadvantage of having to guide an administrative system manned, controlled and worked (except for the Governor General, the Governors and a few officials sent out for short terms from England) by paid permanent officials employed for life in India, without any previous experience or expert knowledge of his own to set against that of the permanent administration. Regard being had to the constitution of the services in India, it may indeed be assumed that the resisting capacity of official India is greater than that of the Civil Service in England (b). His position in the Cabinet on the other hand makes him subservient to the joint decisions of the Cabinet in any matter affecting India which may be of sufficient general importance to require consideration from the Cabinet. Whilst therefore in political matters the decision lies with the British Cabinet, in matters of administration, the Secretary of State for India has to defer habitually to the opinion of his Council and still more to the opinion of the Governor General in (his Executive) Council. The administrative centre of gravity of India may therefore at the present moment be said to shift continually between Whitehall and Simla, the latter (owing to the majority in the Secretary

(i) Resistance from the Permanent Service.

(ii) Devolution of authority to the Governor General in Council from necessity.

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(a) The Montague-Chelmsford reform proposals contemplate the placing of the salary of the Secretary of State on the Home estimates and the constitution of a Standing Committee of Parliament to supervise the administration of India and periodical committees to enquire into and report on further measures for the advancement of constitutional reform in India tending towards responsible government.

(b) See Lecture XXII *infra*, paras 12 and 13.

of State's Council consisting of retired Indian officials) on the whole preponderating.

Control of the India Office over the Government in India—its nature and extent.

64. Through the India Office, however, the Secretary of State for India (whilst generally deferring to the opinion of the Government of India) does keep a constant check and supervision over the administration in India. This is secured chiefly through restrictions imposed upon the spending powers of the Government of India and the rule that no new departure of importance in Indian administration, even though it might not need the approval of the Secretary of State financially, should be made without the previous sanction of the Secretary of State; and, as already indicated, the India Office largely controls Indian legislation (a).

Devolution of power to Secretary of State and Governor-General in Council, statutory yet unlimited.

65. The Secretary of State and the Governor General in Council, it is well to bear in mind, are both statutory authorities. But they are statutory authorities to whom Parliament, from sheer necessity, has had to grant unlimited powers contrary to its general habit. The constitution of the Council of the Governor General has not been materially modified since 1786. At present it "shall consist of five or, if His Majesty think fit to appoint a sixth, six" ordinary members, of whom at least three must be persons who at the time of their appointment have been for at least ten years in the service of the Crown in India and one must be a barrister of England or Ireland or a member of the Faculty of Advocates of Scotland of not less five years' standing. The Commander-in-Chief of the Indian forces may be and is invariably appointed an extraordinary member of the Council and takes rank and precedence next after the Governor General (b). In case of difference of opinion, that of the majority of the councillors prevails, but the Governor-General may in the exercise of his judgment veto any resolution of the Council and adopt or reject any measure against the opinion of the majority (m). The

Governor-General's Executive Council—its constitution

Local Governments,

(a) The domination of the India office over the administration in India is ultimately traceable to the absolute control the Finance Committee of the India Council exercises over the expenditure of India. See *Government of India Act, 1915*. Secs. 21 & 9. See Lecture XXIV *infra*, para 17.

(b) A constitutional practice has recently grown up of appointing one Indian an ordinary member of the Council. The Montague-Chelmsford Scheme of Indian Constitutional reforms proposes the appointment of a second Indian to the Executive Council of the Governor General. See para 272 of the Report.

(m) See Lecture IX *infra*, para 47.

term of office of the Governor-General is short and like the Secretary of State he is nearly always without previous experience of Indian administration and must therefore as a rule defer to the opinion of the permanent officials in the Council and the secretariat.

66. The Local Governments in India ( of which there are 9 major and 5 minor provinces ) are, as they must be in such a centralised scheme of administration, not independent authorities. They are variously organised. Some have Council Government, in others, the administrative head is a senior member of the Indian Civil Service. All the major provinces have Legislative Councils. "But except in cases of extreme urgency, no legislation can be introduced into these Councils by the Local Government without having been examined by the Government of India and their Acts require the confirmation of the Governor General ; and such legislation is also subject to control by the Secretary of State similar to that which he exercises in the case of the Imperial Legislative Council". But however constituted, their legal position with reference to the Government of India and the Secretary of State on the one hand and the people on the other is not dissimilar. As to the former "every Local Government" is by statute required "to obey the orders of the Governor General in Council and keep him constantly and diligently informed of proceedings and of all matters which ought in its opinion to be reported to him or as to which he requires information, and is under his superintendence, direction and control in all matters relating to the Government of its province" (a).

Their legal position, that of agents and mandatories of the Governor General in Council.

67. Their legal position and that of the Government of India with reference to the people will be presently considered.

68. From the constitutional point of view, therefore, the Local Governments are agents and mandatories of the Government of India. So they are also in fact. The reasons which exist in the case of the Secretary of State to pay deference to the opinions of the Government of India do not exist in the same degree in the case of a conflict of opinion between the latter and the Local Administration. In fact the Government of India from the Governor-General in Council downwards

Government, highly centralised.

(a) See Lecture IX *infra*, paras 25-28.

is highly centralised, more so than the Governments in France and Germany (a). As in France and Germany the Central Government retains in its own hands a number of matters of which the most important are, besides those relating to foreign affairs and the defences of the country, "general taxation, currency, debt, tariffs, posts and telegraphs, railways and accounts and auditing. Ordinary internal administration, police, civil and criminal justice, prisons, the assessment and collection of the revenues, education, medical and sanitary arrangements, buildings and roads, forests and the control over municipal and rural boards fall to the share of the Provincial Governments. But even in these matters the Government of India exercises a general and constant control." It lays down lines of general policy, and tests their application from the administration reports and returns relating to the main departments under the Local Governments. The Local Governments have in fact to submit copies of their printed proceedings to the Government of India. The Government of India also employs expert officers to inspect and advise upon a number of departments which are primarily administered by the Local Governments, including agriculture, irrigation, forest, medical, sanitation, education, excise and salt, printing and stationery and archaeology. The Government of India further scrutinises and when necessary modifies the annual budgets of the Local Governments. In fact no new departure in Provincial administration can be undertaken without its preliminary sanction, or, in important matters, without that of the Secretary of State also". The Government of India thus exercises a very full and constant check over their proceedings.

Position of  
subordinate  
officials and  
local bodies  
in the  
scheme.

69. What has been said of the relation of the Government of India to the Provincial Governments is true also of the relation between the Local Governments and subordinate officials, and of the Heads of the departments in the Central and Local Governments and their subordinates. Even local bodies, Municipalities and Rural boards, which have been brought into existence in order to relieve Government of the burden of looking after matters of purely local interest and

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(a) It is necessary to mention that under the Government of India Act of 1858, the Secretary of State has the power of giving orders to every officer in India including the Governor-General. See Decentralisation Commission's Report, part I, Chapter I.

to educate people in the art of self-government, are subjected to official control to an extent unknown either in England or on the Continent of Europe. This control is maintained and exercised with the aid of perhaps the most highly organised Civil Service known to history (a). Nowhere in the whole scheme is there any suggestion of autonomy, local or otherwise. There was none certainly before the Report of the Decentralisation Commission was published (1909), for the Commissioners complain that "both the Government of India and the Provincial Governments have hitherto been too much dominated by considerations of administrative efficiency; they have paid too little regard to the importance of developing a strong sense of responsibility amongst the subordinate agents", and (they might have added) local Municipal and Rural boards. There seems to be a growing belief, even amongst officials, that this excessive centralisation is good neither for the governing bodies nor for the governed (b). The Report of the Decentralisation Commission has indeed recommended a general relaxation of this control from top to bottom and the fostering, in particular, of a sense of individual responsibility in the smaller units of administration and in the local bodies. The majority appear to recommend the grant of a certain measure of autonomy to the Collector who as the head of the District has already, under existing arrangements, a general control over its affairs though subject to close supervision and direction on the part of the higher authorities. There is, however, a large body of informed opinion which opposes the grant of autocratic powers to the heads of Districts. They cannot, they say, countenance any relaxation of central control unless in place of it is substituted some sort of local control. A comparative study of administrative methods, it seems to me, may be of the greatest assistance in

The Civil Service.

Need for decentralisation.

Suggested mode of decentralisation and the teaching of comparative administrative law on the point.

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(a) See Lecture XII *infra*, paras 11 to 13.

(b) "The craze for centralisation", recently wrote Lord Sydenham, "is doubly injurious to the interests of India. On the one hand, it over-loads the Members of the Viceroy's Council with details and unfits them for the proper discharge of their important duties. At the same time, it places far too much power in the hands of subordinate officials whose work cannot be effectively supervised. On the other hand, it takes the life out of the Local Governments, destroys their authority and renders their proceedings unreal". See Article in "The Nineteenth Century and After" for January 1917, "The Danger in India".



arriving at sound conclusions on this point. The conclusion to which an impartial study of administration, English and Foreign, seems to point is that close supervision on the part of the central administration is inseparable from the delegation of large discretionary powers to individual agents (a). Governments of Continental Europe (starting from conditions closely similar to those obtaining in India) were in fact unable to effect administrative decentralisation until after they had learned to associate the representatives of the people in the localities with the agents of the Government in the work of administration. In France and Prussia, those agents have indeed, in local matters, been placed under the direction of local bodies.

Legal position of the Government of India : It is a single unit.

70. We are however concerned at present not so much with the merits or the defects of the present organisation, as with its legal position. The Government of India with all its local divisions and subdivisions is but one comprehensive unit and not an association of smaller units working together for a common end. For an institution of such vast dimensions, it coheres together wonderfully well. Friendly observers call it a perfection in organisation. Critics not altogether unfriendly call it a close bureaucracy, at the same time that that they testify to its general efficiency and the moral purpose which on the whole animates the official hierarchy. At the top of this organisation is the Secretary of State whose powers (obtained by grant from Parliament) are well-nigh unlimited. This unlimited authority extends not merely over administration but over legislation also. He governs with the aid mainly of a Permanent Civil Service. From the Governor-General in Council downwards, the officials exercise powers derived from the Secretary of State, subject, as I have already pointed out, to "a very full and constant check" on the part of the authorities placed above each of them (b). Had the position of the Secretary of State

(a) This, it is gratifying to note, is the keynote of the proposals contained in the Montague-Chelmsford scheme of constitutional reforms for India, at present under discussion. See the next note.

(b) The above analysis of the Government of India is amply confirmed by the joint Report on Indian Constitutional Reforms recently submitted to Parliament by the Secretary of State for India (Mr. Montague) and the Viceroy (Lord Chelmsford). The proposals contained in the report, if

for India been the same in relation of the Crown as that of His Majesty's other Secretaries of State, and had it not been for certain other elements in this organisation, to which I shall presently refer, the Government of India would in fact (though not in theory) have been the most irresponsible of autocracies known to the world, second not even to the Russia that has just passed away (a).

71. Amongst the most precious of legacies bequeathed by the East India Company to India is the legally recognised corporate character of the Indian administration. The East India Company was in its inception a private company and though in course of time it came to assume sovereign powers exercisable in trust for and on behalf of the Crown, it never became in the eye of (English) law, a servant of the Crown. For acts of tort committed by its servants, of whatever grade, it could be sued by any person owing allegiance to the Crown like any private or public corporation. For contracts too made by or on its behalf by its servants acting within the scope of their authority, action lay against the Company in the ordinary Courts. Though there appears to be some apparent difference of opinion in the matter, it seems on principle impossible not to hold that no plea that the act in question was an "act of State" (and therefore not open to review by Civil Courts) would be admissible in defence to a suit by a British subject (b). The subjects of the Crown under the Company thus enjoyed the protection of

Corporate character of the Government of India, a legacy from the East India Company: its legal consequences.

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adopted, will involve the immediate creation in the Provincial Governments of a sphere of autonomy, limited tentatively to certain specified subjects, those Governments retaining in other matters (as also the Government of India over them) their present day character, *viz.*, of independence of local control but subjection to the Secretary of State. It is expected that in course of time, and as the result of periodic Parliamentary enquiries, it would be found possible to transfer to Ministers responsible to representative Provincial legislatures other subjects, until the goal of the policy announced in Parliament on 20th August 1917, *viz.*, "the progressive realisation of responsible government in India as an integral part of the British Empire" will have been fully realised. The progressive extension of responsible government in India will necessarily involve a progressive relaxation of the control of the Secretary of State for India and the Government of India.

(a) See the article on Russia in the 11th edition of the Encyclopedia Britannica for an accurate and unprejudiced description of the Russian administration which came so dramatically to an end the other day.

(b) See Lecture XIII *infra*, paras 20-27.

Right to sue  
Government  
for contract  
and tort.

Cannot be  
taken away  
by Indian  
Legislation.

the law courts against illegal acts of their *de facto* sovereign to an extent unknown even to English constitutional law. This advantage, which is enjoyed by British subjects in some other parts of the British Dominions also (see *Eastern Trust Company v. McKenzie Mann & Co.* (a), they were not required to relinquish when the Government passed directly under the Crown. By Sec. 65 of the Government of India Act of 1858, the Government of India was given the right to sue and was made suable in the same manner and to the same extent as the East India Company in the Courts as well of India as of England in the name of "the Secretary of State for India in Council." And as legislation in India (as already stated) is substantially under the control of the administration, the Act went on to provide that the right of action against the Government was not to be taken away by any legislative measure passed in India. *Secretary of State for India v. Moment* (b).

Control of  
"the Secretary of State  
for India in Council" over  
Crown properties and  
revenues in  
India.

72. To complete this picture of the corporate character of the Government of India as represented by the Secretary of State for India Council, it is only necessary to add that though what is, not inaccurately, called Government property and all revenues received or receivable by the Government of India in terms belong to His Majesty "for the purposes of the Government of India", these remain at the disposal of the Secretary of State in Council and are liable for all debts and liabilities incurred lawfully by the Secretary of State in Council and his agents and for all judgments and executions suffered by him. Substantially therefore, though not technically, the Secretary of State for India in Council is a body corporate for the purpose of holding property. The fact, however, that in

(a) (1915) A. C. 750 at p. 759.

(b) L. R. 40 I. A. 48. Quite recently, the Government of India put forward proposals for removing this last restriction. The Indian legislative bodies, they urged, should have authority to exempt the Secretary of State for India in Council from liability to action in particular cases or classes of cases. The proposal roused wide-spread opposition in India, was disapproved by the Joint Committee of the two Houses of Parliament to which the Bill embodying this amongst other proposals had been referred and was ultimately dropped. An abstract of the proceeding before the Joint Committee which is highly instructive from the point of view of the present subject, will be found in 21 C.W.N. pp. 17-28 (notes).

law the property is technically owned by the Crown entitles the Government of India to privileges in respect of debts due to it similar to those of the Crown in respect of Crown debts in England. *Ragho v. Mewa Lal* (a). It has also been repeatedly laid down that the Government of India is not bound by a Statute unless the intention to bind it appears expressly or by necessary implication from the language of the Statute. *Secretary of State v. Bombay Landing etc. Co.* (b) *Ganpat v. Collector of Canara* (c). *Secretary of State v. Mathurabhai* (d) and *Bell v. Municipal Commissioners of Madras* (e).

73. It is clear that this liability to action at the instance of private individuals, which arises from the corporate character of the Government of India, by itself, must place important limitations on the free action of the Government. For every new encroachment on the rights of a subject as determined by the law in force at any particular moment, the Executive Government must seek authority from the Legislature; and in any case, it is always open to British subjects in India to test the validity of any act of the Executive by an appeal to Courts of law. (f).

Liability of Government to action as an element of administration according to law.

74. If it be not open to the Government of India as such to take shelter behind a mere plea of "act of State", still less is it open to an official under that Government to set up such a plea in defence of an act done in excess of his powers under the law. It is a notable fact that the clearest enunciation of the ground of liability, under English law, of public officials for torts committed in the discharge of official duty is to be found in a case which went up to the Privy Council from India. *Rogers v. Rajendro Dutt* (g).

75. The Government of India, however, being able to control legislation can (and does) take for itself and for its agents large statutory powers of interference with private rights. But its habit, normally, is rather to invite and accept statutory limitations even where it is under no constitutional

Liability of Government officials.

(a) I. L. R. 34 All. 223. (b) 5 Bom. H. C. Rep. O. C. J. 23.

(c) I. L. R. 1 Bom. 7. (d) I. L. R. 14 Bom. 213, 218.

(e) I. L. R. 25 Mad 457.

(f) "The Government like its subjects is amenable to the law." Strachey, "India: Its Administration and Progress" 3rd Edn. p. 377.

(g) 8 Moore I. A. 103.

obligation to do so (a). This is the second most important element which tones and tempers the autocracy of the Indian Government.

History of  
Legislative  
decentralisa-  
tion in  
India,—  
Decentralisa-  
tion precedes  
separation of  
organs

76. Legislative decentralisation, in the sense of separation of the legislative from executive functions, seems to be ingrained in the mental constitution of English politicians. It is a remarkable fact that in British India the separation of the executive and legislative functions of the Government had taken place long before there was a visible separation of the Legislative from the Executive organ. It commenced indeed almost from the very moment the East India Company as Dewan began to take a hand in the active work of administration, before even the Company had time to define its position and make it good in the eye of Parliament. The principal objection of the Company's servants to the system they found in operation was that "it was not a system of written rules and plain principles" (b). By 1781, they had already framed Regulations for the proper conduct of the administration sufficiently numerous and varied to need codification. By granting authority to the Executive Council to frame Regulations, the Charter Act of 1781 was in fact merely according Parliamentary sanction to a practice which English administrators in India had been following from sheer force of habit. The spirit which led these early English administrators to deny themselves the exercise of arbitrary powers which the law gave them has nowhere found nobler expression than in the Preamble to Reg. II of 1793.

(b) This habit leads the administration in India not only to invite statutory regulation of administrative functions in most important matters but also to lay down minute administrative rules for the guidance of departments and all ranks of administrative officials in matters in which the Legislature has left complete freedom to the Executive. Thus, of the Lieutenant Governor, Sir John Strachey in the book just cited (p. 375) says: "The checks against the wrongful exercise by the Lieutenant Governor of arbitrary powers are complete. There is no branch of the administration in which he is not bound either by positive law or by the standing orders of the Government, or by the system which has gradually grown up under his predecessors". Of District Officers, the same writer says (p. 361.) "It must not be supposed that he has any irresponsible or arbitrary power. All his most important duties are strictly regulated either by law or by rules laid down by the Government, and all his proceedings are subject to supervision and when necessary to correction."

(a) Field's Introduction to Bengal Regulations, p 68.

77. "All questions", says the Preamble, "between Government and land-holders respecting assessment and collection of public revenues.....have hitherto been cognisable in the Courts of Mal-Adalat or Revenue Courts. The Collectors of revenue preside in those Courts as Judges and an appeal lies from their decisions to the Board of Revenue and from the decrees of that Board to the Governor General in Council in the Department of Revenue. The proprietors", the Preamble goes on to say, "can never consider the privileges which have been conferred upon them as secure, whilst the Revenue officers are vested with these judicial powers" for it is obvious that if the Regulations for assessing and collecting the public revenue are infringed, the Revenue officers themselves must be the aggressors and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another"....."Government" therefore, "must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landlords. The revenue officers must be deprived of their judicial powers. All financial claims of the public when disputed under the Regulations, must be subjected to the cognisance of Courts of Judicature superintended by Judges who from their official situation and the nature of their trusts shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land.....The Collectors of revenue must not only be divested of the power of deciding upon their own acts but rendered amenable for them to the Courts of Judicature".

Lord Cornwallis's conception of separation of functions.

78. Without pressure from Parliament and in the absence of any demand from a disaffected people, and entirely of its own initiative, an administration charged by Parliament with plenary powers, effects within itself by a series of self-denying ordinances a "separation of powers" which it had taken long centuries to mature in its original home, and longer still in the countries on the Continent of Europe. In one respect the lines laid down in the Preamble quoted above have not been consistently followed. Revenue Courts presided over by officers actively engaged in revenue administration exist in all parts of the country and the Government in recent times have shown a marked inclination towards removing all matters

Subsequent departure therefrom.

Are Revenue Courts administrative Courts?

affecting directly or indirectly the agrarian interest from Civil to Revenue Courts, herein approaching rather the Continental than the English principles of administration (a). But here again the law and procedure applicable in these Courts are, according to inveterate English practice, laid down by statute and the mode of trial is almost invariably litigious and not inquisitorial as in the Administrative Courts on the Continent of Europe. In fact, barring the personnel of the judges who sit in these Courts, they are hardly distinguishable from Civil Courts, and appeals may ultimately lie from these Courts, as King's Courts, to the Judicial Committee of the Privy Council (b), and appeals from the decisions of inferior Revenue Courts are often allowed by statutes to be taken to Civil Courts and sometimes to the High Courts. The High Courts under some of these statutes exercise revisional jurisdiction over inferior Revenue Courts.

Separation  
of legisla-  
tive and  
executive  
organs in  
1833 and  
subsequent  
progress  
thereof.

Councils Act  
of 1853.

Councils Act  
of 1861.

79. As previously noticed, up to 1833, the executive and the legislative organs remained undifferentiated. By the Charter Act of that year, the members of the Executive Council of the Governor General together with the law member (who was not to be a servant of the Company and was not authorised to sit in the Executive Council) were constituted into a Legislature. In 1853 the law member was absorbed into the Executive Council and the Legislative Council was reconstituted by adding to it two judges of the Supreme Court at Calcutta and Company's servants of 10 years' standing appointed by the several Local Governments (c). The Councils Act of 1861, for the first time admitted a

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(a) See Baden Powell, *Land Revenue in British India*, 2nd Edn, Ch. IX.

(b) See *Mahomed Ewaz Ali v. Maheshur Pershad*, 12 C. W. N. xv (15).

(c) The Legislative Council of 1853, though composed wholly of officials, proceeded forthwith to constitute itself into a "grand inquest of the nation" after the manner of the British Parliament. This did not commend itself to the Government either in India or in England and the Councils Act of 1861 which superseded it expressly deprived members of Council of the power of interpellation. This power was not restored till 1892. The power has been extended by the Councils Act of 1909, which gives members the right to put supplementary questions and the right to pass resolutions in all matters of public importance and in connection with the Financial Statement. The resolutions, however, operate only as recommendations and are not binding on the Government. Further improvements of the privilege of interpellation have been proposed in the Montague-Chelmsford Report on Indian Constitutional Reforms, see paras 234, 266.

limited number of non-officials to sit and vote in the Legislative Council of the Government of India and in the Legislative Councils of the Local Governments which were at the same time or shortly afterwards established in the Madras, Bombay and Bengal Presidencies and in the North-Western Provinces. The Councils Act of 1892 increased the number of additional members and allowed the Executive Government to make rules for nominating some representatives chosen by local bodies and other corporations and representatives of particular interests. The Councils Act of 1909 enlarged the number of Councillors in the Central as well as the Local Legislatures. A fairly large number of seats in the Councils (the fewest in the Central Provinces, the largest in Bengal) have been given to non-officials, who are mostly to be elected by constituencies bearing a more or less representative character, some seats being reserved in the hands of the Government to provide representation for special interests. Into the details of the constitutions of the several Legislative Councils of India it is not necessary here to enter (a). It is necessary, however, to note: (1) That even the Governor General's Council does not, and still less do the Local Councils, possess plenary powers of legislation. The matters absolutely excluded from consideration by the Governor General in his Legislative Council are comparatively few. A number of others [e. g. measures affecting (a) public debts and public revenues or imposing any charge on the revenues, (b) religion and religious rites of any class of subjects in India, (c) discipline or maintenance of the army or navy, (d) foreign relations] cannot be discussed without the Governor General's previous sanction. An Act after it has been passed by the Council requires for its validity the assent of the Governor General and, even when he has assented, may be disallowed by the Crown (i. e. to say, by the Secretary of State). The powers of the Local Councils are necessarily much more restricted. (2) That in the Governor General's Council there is a standing official majority who are bound to vote as directed by the administration (b) and (3) That in the Local Legislature though there is a non-

Councils Act  
of 1892.

Councils Act  
of 1909.

Limits to the  
legislative  
authority of  
the Councils.

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(a) See Lecture IX *infra*. paras 52 to 68, and the footnotes thereto.

(b) See *supra* Lecture V, para 60, and Iyengar's Indian Constitution, Second Edition, p. 35.



official majority the elected element in it is, except in Bengal, in a minority.

Value of the  
legislative  
Councils.

(i) As reflecting  
popular  
feeling.

(ii) In the  
establishment  
of the rule of  
law."

80. The constitution of the enlarged Council of the Governor General reflects in a manner the spirit of the administration itself. The official control over the Legislature is beyond question. There is apparent at the same time a painful anxiety to reach the minds of the people and to adapt the laws of the country and its administration to their sentiments and prejudices. If the gulf which nevertheless subsists between the minds of the officials and the minds of the people still remains unbridged, it is because the Legislatures, as at present constituted, besides being impotent, are altogether unrepresentative. (a).

81. The fact, however, that the Legislatures in India are too much under the control of the Executive though open to comment must not be suffered to obscure their importance and the effect they may have on the tone and temper of the administration. There is, it is true, hardly any law which the Government may not get passed in any of the Legislative Councils in India or which it may not prohibit or veto if it so wills. But for all that it cannot and will not act without the sanction of a rule of law formally passed and promulgated. The Executive in other words has to and does habitually act in the open and according to set rules and not arbitrarily and in secrecy. The laws passed by Legislatures so constituted may not always be unexceptionable as laws but they are none the less laws which being laws must place some limitations on the arbitrary exercise of powers (b).

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(a) The Montague-Chelmsford Reform proposals now under the consideration of Parliament expressly seek to bridge this gulf by making the Provincial legislative bodies really representative and the Legislature of the Government of India more so than it is at present. The scheme however contemplates that only specified departments will be handed over to the representative Provincial bodies to start with and that as to the rest the Government will retain its present character in all its essential features.

(b) The working of the States Prisoners Regulations (Beng. Reg. III of 1818, Bom. Reg. XXV of 1827 and Mad. Reg. II of 1819) and the internment ordinances under the Defence of India Act (IV of 1915) can hardly be made to fit in with the above description. But these laws themselves are anomalies which ordinarily should find no place in the public law of any part of the British dominions. The facility with which statutes conferring on Executive authorities unlimited powers of interference with people's

82. Not only, therefore, is there in India the "rule of law", but it is of the same kind as that obtaining in England. It is this that has given stability to an alien Government. Those who aver that Orientals have no appreciation for any but personal rule and that the one solution of the growing difficulties of administration in India is to erect Collectors of districts into petty despots, unchecked even by the administrative control of the higher executive and unhampered by law, misread both history and human nature. The stability of British rule in India is best explained by the contrast it presents to the Oriental rule which preceded it. It was personal, it was arbitrary. It was, as the early English administrators justly complained, "not based on written rules and plain principles."

The "rule of law," the secret of success of British Indian administration,

83. The Indian administrative machinery of the present day is, on the whole, admirably constructed, its soundest elements being those derived from English administrative law. Its real defect—and this it does not owe to its English exemplar—is that it is so wholly artificial. It is not so much alien as it is non-national. It does not represent, as any up-to-date modern administration should, the living forces of present day Indian society. It is far too impersonal. It is not charged with its wants, its pains, its cravings and its desires. What wonder then, that with all its manifold merits, it has failed up till now to guide its aspirations (a) ?

What is still wanting in that administration; it should be made popular.

84. If now after a survey, such as I have been able to make, of the most advanced systems of administration at present in existence, I was asked to fix the place of the Indian administration, I would undoubtedly regard it as a stem of the parent English stock. Nevertheless, similarity in cir-

Place of the Indian administration in a general classification of administrative systems.

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rights can be passed through Indian legislatures is itself a danger which needs guarding against in the interest of the administration. See Lecture XVIII *infra*, paras 39, 53.

(a) The pronouncement of policy made on the 20th August 1917 in the British Parliament, that the goal of the British Government with reference to administrative reforms in India is "the progressive realisation of responsible government in India, as an integral part of the British Empire", appears to contain in it a definite promise to remove the defect outlined above, by nationalising the Indian administration. The Joint Report recently submitted to Parliament by the Secretary of State for India and the Viceroy seeks to give partial effect to this promise.

Born of English stock, it bears certain resemblances to the Continental administration.

Administrative appeals.

Combination of judicial and executive functions in the administration of criminal law.

cumstances in a variety of matters, chief amongst which is the necessity of maintaining a highly centralised control, has had a tendency in several particulars to assimilate the Indian system with the Continental rather than with the English. The existence of a form of Administrative Courts (Revenue Courts) I have already noticed. The second point of resemblance is to be found in the extensive prevalence of administrative appeals. This, as I have already said, is unavoidable wherever large powers not checked and supervised by local popular institutions are entrusted to Government officials in places removed from the seat of Government. Such appeals are permitted in many cases where the aggrieved party has a remedy by suit. The Government has framed elaborate "Petition Rules" for the disposal of these non-judicial administrative appeals (a).

85. There remains only to notice one other feature of the Indian administration which makes it suffer in comparison with both English and Continental systems. In England, Justices of the Peace formerly combined in their own persons both judicial and administrative functions. Since the passing of the Local Government Act of 1888, they have been deprived of practically the whole of their administrative duties. They are still conservators of peace and criminal magistrates at the same time ; but they are unpaid non-professional officials and are for that reason, in fact though not in theory, independent of the Executive. In England, therefore, the combination in the same person of judicial and police functions does not lead to abuses. On the Continent where, had it existed, it would have led to great abuses owing to the centralised character of the administration, jurisdiction in criminal cases has fortunately been given exclusively to the ordinary courts.

86. In India, unfortunately, the administration has needlessly indentified itself with the police, to the same extent almost as it has indentified itself with the administration of land revenue. The Criminal Magistracy, like the Revenue Courts, is manned in India by officials actively engaged in what is strictly police work, viz.—preservation of peace in the locality (b). The principle that for the proper determina-

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(a). Decentralisation Commission's Report, Chs. IX & XXXIV.

(b). The origin of this combination of judicial and executive functions in the administration of the criminal law is traceable to the system originally

tion of questions of public law, the judges must have experience of administrative work, can have no manner of application to the administration of the criminal law, which in India is almost wholly statute law. The criminal law of India being in many respects exceptionally severe (k), the Government will distinctly be a gainer by ridding itself once for all of the suspicion, from which under present arrangements it unavoidably suffers, that it seeks to mould not merely the law of crimes but the very decision of criminal cases in accordance with official views.

established by Lord Cornwallis in Bengal. In 1786, the date of the first formation of the Districts as the principal administrative units, the head of the district was vested with the powers of Collector, Judge, and Magistrate. In 1793, Lord Cornwallis by Reg. II. of that year deprived the Collector of his judicial and magisterial functions, and these latter were entrusted to another officer except in regard to jail deliveries which were made by a separate Court of Circuit. Subsequently the duties of the Magistrate were separated from those of the Judge who on the other hand was constituted a Court of Sessions for trying serious cases of crimes, the trial of less serious offences remaining as before with the Magistrates. In 1835, the offices of Magistrates and Collectors were re-united. It is thus that the Magistrate-Collector came to exercise both judicial and executive functions. Subordinate Magistrates similarly exercised combined judicial and executive functions, and, as already indicated, by a process of reversion, these officers have, since the days of Cornwallis, acquired judicial powers in relation to the administration of revenue and generally for the regulation of the agrarian interest. Imperial Gazetteer of India, Vol. IV Ch. 2 and the Fifth Report in Ascoli's Early Revenue History of Bengal, pp. 115, 144-5, 157, 171, 174.

(k) Mr. J. S. Cotton in Halsbury, Laws of England, Vol. X. pp. 620-1. "Indian legislation includes several special measures for the prevention and repression of crime."—amongst which are enumerated (i) deportation, (ii) measures for the prevention of offences as embodied in part IV of the Criminal Procedure Code (Act V. of 1898), (iii) *ex-parte* enquiries under the Criminal Law Amendment Act, XIV of 1908, (iv) trial without jury under the same Act, (v) the provisions in the same Act relating to unlawful associations; to which may be added (vi) the Press Act, I of 1910, (vii) the Prevention of Seditious Meetings Act, X of 1911 and (viii) the law as to Criminal Conspiracies enacted in Act VIII of 1913.

## LECTURE VI

### RULES OF ADMINISTRATIVE LAW.

#### *Classification and Sources.*

Administrative law, properly so called, found in modern politics only.

1. The principal historic and typical modern forms of administration have now been passed under review. That review, I venture to think demonstrates the thesis with which I opened my first lecture, viz: that in only modern forms do we find administration to be truly in accordance with law, and that administrative law properly so called is the peculiar property of modern politics.

Rules of administrative practice in ancient politics not rules of law.

2. I do not however suggest. (as indeed I said in the course of that lecture) that because administrative law is the peculiar mark of modern administrations, all by-gone forms of administration must therefore be necessarily taken to have been lawless and capricious. The survey of historic politics made in previous lectures has, I believe, fully demonstrated that they were not. It is indeed impossible for any form of government, even the most malevolently tyrannical, to exist, far less to operate with efficiency, unless it should succeed in organising itself into a system, and a system implies the prevalence of rules and principles over lawlessness and caprice. Some of these governments, I have further shewn, were animated (considering their age) by a reasonably high conception of duty. Regard being had to the circumstances of their times, many of them would be adjudged to have been quite successful forms of government; whilst most of them have left contributions to the art and methods of government, which posterity will not "willingly let die". The rules and principles by which they were guided did undoubtedly contain the germs of the administrative law that was coming, but they did not constitute administrative law themselves. In time, however, under favourable conditions and the influence of ideas not fully realised in ancient politics, they came to provide the ground-work for that structure which in modern systems constitutes administrative law.

3. Who will deny, for instance, that the Athenian or the Roman governments, or the administrations of Asoka and

of the Venetian Republic in the thirteenth and fourteenth centuries were scientifically organised and acted according to rules? But the point is that these rules were rules of imperfect obligation. Though normally observed, they were not obligatory, and what is more, there was no machinery other than the will of the Government by which persons interested or aggrieved could enforce their observance, such as persons similarly situated have today, viz: through the arbitrament of the judicial organ of the State.

Rules of imperfect obligation.

4. If the government or any department or agent of government failed to do its (or his) duty, the remedy lay in the hands of the sovereign assembly or the sovereign king. The jurisdiction, if the word may be properly used in this connection, was purely administrative, not legal. In this respect there was little to choose between the methods of a democracy like that of Athens or a bureaucratic aristocracy like that of Imperial Rome. The rules of administration were rules which the Government chose but were not bound to follow.

Dependence for enforcement on Sovereign's will.

5. The case was the same in regard to administrative rules which the Government imposed on its subjects. The citizens of such ancient polities as Athens or Rome were more and not less "State-regulated" than we are. How many more officials had Athens proportionately to her population than we have? "One could hardly take a step in the city or the country," says M. Fustel de Coulanges, "without meeting an official" (a). The condition of the later Roman Empire as depicted in a previous lecture should leave no sort of doubt in this matter. I have also shown how completely commerce, the main occupation of the people of the Venetian Republic, was State-regulated. All ancient and modern monarchies and all city governments, ancient or medieval, erred rather in the direction of ever than under-regulation of the lives of their subjects; and one of the earliest services performed by modern constitutional governments was to break these shackles—not of law, but of absolutism—when misconceived, or, to convert them, when beneficent, into rules of law. These rules, except in so far as they were incorporated into the criminal law of the State, were, outside

Administrative ordinances addressed to the public.

Their profusion in Ancient and Medieval polities.

Did not become law until enforced as in England by courts.

(a) "The Ancient City," Book IV, Ch XI.

England, directly enforced by State officials, subject to the control, if any, of the executive (a). In England only had the administration of these rules passed to courts and in consequence assumed the character of laws proper (b). These rules, though they might be called laws were really administrative orders issued by the State to its agents for the proper execution of which the latter were not legally responsible to the persons upon whom they were to be executed. The responsibility, if any, was to the State.

Administrative appeals alone do not make the "rule of law."

6. What remedy had the subject in these States against the failure of officials to perform their duties or against harsh or improper execution of the laws? They could only appeal to the higher authorities who might or might not attend to their complaints. Administrative appeals have not ceased to be of value even in modern States and they fill in gaps which even the most perfect system of administrative law must leave in any scheme of government and as such will require attention in a subsequent lecture (c). But by themselves they do not, and cannot, establish that "rule of law" which is the visible outcome of a sound system of administrative law.

A scientifically organised Government may conceivably be without administrative law.

7. It is clear, therefore, that a scientific distribution of the business of government among distinct departments and a distribution of the work of each department amongst a body of hierarchically disposed officials each having his appointed functions clearly mapped out for him, and a multitude of regulations determining the relations of departments and offices *inter se* and the relations of officials and the public,

(a) Compare Holdsworth's History of English Law, Vol II pp. 385-392 and Brissaud's History of French Public Law, pp. 409-411.

(b) See Holdsworth's History of English Law, Vol. II p. 337. In the whole of the discussion in this lecture and in fact throughout the book, I have assumed a conception of law which may not agree with the orthodox definitions in books of jurisprudence. My standpoint, however, is entirely English, that is, that law is what the courts recognise and enforce: what they refuse to recognise is not law. But I have to stretch this notion of law a little so as to bring constitutional conventions within its scope. Why I do that will appear in a subsequent portion of this lecture. Read in this connection Lowell's Government of England Vol. II, Chap. LXI, also Vol. I, Ch. I.

(c) See lecture XXIV *infra*, para 29.

coupled with the most efficient system of official supervision attainable, designed to see to the enforcement and proper application of these rules, do not by themselves produce administrative law.

8. I do not overlook the fact that in Athens and Rome, at any rate, citizens were free to sue Magistrates in civil and criminal courts for misconduct in office. This only means that officials who had been not merely remiss or negligent but had actually violated the law, were not, as they came to be in some modern countries free from liability to action in ordinary courts. But the State could never, in any such case, be made accountable to the aggrieved citizen for its agent's wrongs, as on the whole it can be in most modern States. Nevertheless, it is true that the citizens of Athens and Rome enjoyed a right enforceable in courts of law against agents of Government acting under colour of office, and this, I believe, is the only point where these States can be said to have possessed any rules of administrative law. It is clear however, that even this rule—which should be the ordinary rule everywhere—assumes its value in our eyes only because by a perversion due to peculiar historic circumstances, the contrary rule came to prevail in most post-feudal monarchies of Europe (d).

How far there was rule of law in Athens and Rome.

Loss of jurisdiction of ordinary Courts over officials on the Continent of Europe.

9. I think, I can now affirm that rules of administration to be rules of law must be capable of enforcement through courts of law, a proposition which assumes as its basis the separation and substantial independence of the judicial from the other organs of the State.

Administrative law presupposes the separation & substantial independence of the judiciary.

10. Rules of administrative law, it is clear, may have reference either (1) to the organisation of the administration, that is to say, to the relations which should subsist between the different organs of the State and the administration,

Rules of administrative law classified.

(d) In the struggle which the Princes in Europe waged against feudal anarchy, it became essential to the success of the former to free their agents from the jurisdiction of the feudal courts of seigniors and barons. Modern administrative courts are a later invention designed to bring the agents of the triumphant Princes under the "rule of law." In England it never became necessary to free the agents of the King from the jurisdiction of courts, because the courts there which exercised jurisdiction were Royal courts. Hence too no administrative courts in England. See Lecture XVII, *infra*, para 2.



I. Substantive administrative law, two divisions of, determining (i) relations of organs of State *inter se* and (ii) relations of State & citizens.

Citizen's rights, as a branch of substantive administrative law.

11. Adjective administrative law.

Rights made real by remedies.

Rules of adjective administrative law to enforce citizens' duties.

or (2) to the relations of the State and its agents with the public. These two by no means exclude each other ; for the relations of an official towards a member of the public can only be correctly determined by examining the powers which the law has assigned to him. The two must, in fact, interact, for the distribution of business amongst officials and the delimitation of their powers and duties must also be determined by the nature of the public interests that are to be served thereby. This is so far the case that in dealing with the organisation of the government it will be impossible not at the same time to deal indirectly with the relations of each organ to the public. In fact what may be designated "Substantive Administrative Law" can be adequately dealt with only in a treatment of the organisation of the administration and the legal relations of the organs of the administration ; and that is the plan which will be followed in dealing with this branch of the subject : and when this has been done, a comprehensive lecture devoted to "Citizens' Rights" is all that will be needed to complete the treatment of this branch of the subject.

11. There would still remain what may be called "Adjective Administrative Law." This branch of the subject will concern itself with the methods by which the rights and duties of the Government and its agents and the rights and duties of the subjects in relation to Government and its agents may be protected or enforced. The importance of adjective administrative law can hardly be over-rated. No right really exists without an enforceable remedy. It is only because modern politics have been able to develop the machinery for enforcing rights and duties as between the organs of Government and the subjects, and in so far as they have done so, that what formerly were at best rules of administrative *practice* have become rules of administrative law. Many modern constitutions have had embodied in them long tables of inalienable citizens' rights—which in several cases have proved of no value whatever simply from lack of suitable machinery to enforce them (a).

12. Rules of administrative law cannot content themselves with merely determining the static relations of the State and

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(a) See Lecture XXI *infra*, paras 22-24.

the citizens. They will often command obedience on the part of citizens to general and specific orders or injunctions. Accordingly, an important portion of Adjective administrative law will concern itself with providing (1) for the application of such rules to individual cases, and (2) remedies in case of disobedience by those to whom they were addressed. These two topics have reference to citizens' duties. With reference to their rights, and generally with reference to the duties of Government and its agents towards citizens, the principal subject of adjective administrative law will be (3) the methods which have been devised for the exercise of judicial control over the acts of Government and its agent. This, it need hardly be stated now, would represent the core of administrative law.

Judicial control of administration.

13. As previously indicated, the control of the Courts has but a limited operation and has, in the interest of good government, to be supplemented by two other forms of control of ancient lineage. These are (i) administrative control of superior officials and (ii) administrative (or rather quasi-administrative) control of the Legislative Assembly. This is generally but inaccurately described as Legislative control. But I should prefer to call it the Political control of the Legislature to distinguish it from Administrative control proper exercisable by the higher executive on the one hand, and the indirect control which exclusive power of legislation enables the Legislature to exercise over the administration through its laws, on the other. Although strictly not an integral portion of administrative law, no proper idea of the administration in actual working can be formed without an adequate knowledge of the practices which govern the exercise of these forms of control (a).

Supplementary administrative & legislative control.

14. Having thus mapped out the field of administrative law, I proceed to consider its sources.

Sources of administrative law.

15. In a system ideally constructed on the basis of separation of powers as conceived by Montesquieu and Blackstone, there should be but, one source of administrative as of other law, viz., legislation. But the *matter* of administrative law had been growing in every country before the separation of

Administrative legislation earlier in origin than private law legislation.

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(a) See Lecture XXIV *infra*.

functions had been attained in any one of them. The idea that law could be made by any human agency was foreign to early politics. Laws had to be "found" by Judges or other experts (e.g. the *nomothetae* in Athens). It would indeed not be inaccurate to say that early politics did not possess a truly legislative organ. As was shown before, the Assemblies in ancient politics were primarily executive bodies. When people came to see that customary laws, sanctified as they were by religious sanction, were yet not perfect and needed alteration, the Sovereign Assembly, as in Athens and Rome, almost reluctantly took upon itself the invidious task of readjustment, but the changing of the laws was viewed with such grave concern that the duty of preparing them was invariably entrusted to men of more than ordinary reputation for wisdom. (a).

Their true character not laws but executive ordinances.

16. But there was no occasion for any such hesitation in the Assembly's framing administrative resolutions, and the *prosephismata* in Athens and the *leges* in early Rome were passed with the greatest freedom. As the Assembly came in this way to combine both legislative and executive functions, one is apt in these days to mistake these early administrative resolutions for laws as the ancients understood by that term. But the more correct way of regarding them would be to treat them as executive ordinances. Whenever, as in Rome (and in England), the Sovereign Assembly ceased to perform executive functions, these ordinances tended to assume the character of general rules of more than passing interest and in this way became assimilated to laws. This separation of the executive from legislative functions, so far as the Assembly was concerned, was, as we have previously noticed, a temporary phase in the history of Rome. With the coming of the Principate, the issuing of rules of law, administrative or otherwise, once more fell into the same hands.

The phenomenon repeated in Feudal Europe.

17. When we come to the Feudal monarchies of Western Europe, the reversion to barbarism which characterised this stage of the history of that part of the world is marked by a return to the primitive reluctance for changes in the law. Rules of law proper are "found" by Courts and can be changed,

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(a) The normal method of introducing changes in the law was, of course, by legal fictions and equity. Maine's *Ancient Law*, Chaps. I to III.

if at all, only with the consent of the whole community. But the King, as the Chief Executive, is free to issue administrative ordinances, by whatever name called, whether as "bans" (a) capitularies (b), constitutions (c) or ordinances (d). In France, where no legislature independent of the King came into being until the eve of the French Revolution, the King came to be the one source of administrative as of other laws. In England on the other hand two other sources grew up by its side, one the Royal Courts of law and the other the Parliament.

(i) Royal Ordinances as a source of administrative law.

Other sources in England.

18. As the Courts were supposed only to *declare* laws, their activities in the field of administrative law were necessarily limited, being confined virtually to fixing the limits, according to Common law, of the spheres of royal power exercised whether directly or through agents and the rights and duties of individual subjects and bodies corporate in relation to the State or its officials.

(ii) Judicial decisions.

19. Parliament, on the State other hand, soon after it had passed the petitioning stage, easily fell into the habit of framing ordinances intended to regulate and reform every element in society, from peer to serf, from merchants to artisans and day-labourers, the landed as much as the trading interests, professions no less than guilds, not forgetting peoples' diets and apparel and even their recreations (e). During the four hundred and odd years that have passed since this era of experiments in State regulation, the legislative power of the English Parliament has been so thoroughly organised as virtually to displace the ordinance power of the King, which now can be exercised only in relation to 'conquered and ceded' territories (f). For the same reason the Courts have ceased to arrogate to themselves even unconsciously powers of legislation whether in the field of private or of public law. Both the executive and the judiciary, in their proper spheres, have no

(iii) Statutes.

(a) See Brissaud, History of French Public Law, p. 68.

(b) *Ibid*, p. 81.

(c) In England.

(d) In Monarchical France. Brissaud's History of French Public Law, pp. 356-358.

(e) Holdsworth's History of English Law, Vol. II pp. 385-392.

(f) See Sir Henry Jenkyns's British Rule and Jurisdiction Beyond the Seas, p. 6.

Ultimate  
source in  
England now  
Parliamentary legisla-  
tion.

doubt had given to them ordinance power delegated by statute, which each can exercise within the sphere limited by the legislature. It would not, therefore, be wrong to say that in England of to-day the original source of all administrative ordinances is Parliament—a result which seems logically to follow where a separation of powers in the sense it was understood by Montesquieu and Blackstone has been substantially effected.

In France.

20. Quite otherwise has been the progress of events on the Continent of Europe. In France, the Legislature was only established at the Revolution, and the Constituent Assembly put forward an interpretation of the doctrine of separation of powers (since consistently followed in subsequent Constitutions) which repelled all attempts to subordinate the executive to the existing Courts of law. Under Articles 53-55 of the Constitution of 1793, the Legislature assumed power to make laws and “decrees”, and, except for a short interval during the empire of Napoleon, this power it has retained under each successive Constitution. But in matters relating to the administration, the legislature in France habitually refrains from laying down more than general principles, leaving the power of the executive to issue administrative ordinances virtually unfettered as under the Monarchy. This power of the President to supplement the law by ordinances is now expressly recognised by the Constitutional Law of February 25, 1875 (a). Thus executive ordinances still remain the main source of administrative law in France, statutes of the legislature being at the same time a secondary but not altogether unproductive source.

(i) Executive  
ordinances  
still the main  
source.

(ii) Parlia-  
mentary  
legislation  
a secondary  
one.

(iii) Judicial  
decisions a  
highly impor-  
tant new  
source.

21. But, by a peculiar irony, judicial decisions have come to be an equally important source of administrative law in modern France—more important than it is today in England. This has grown out of the reorganisation of administrative tribunals by Napoleon’s legislation of 1800. These courts were given jurisdiction to review official acts which affected individual rights, and, as I have previously explained, in the absence of rules framed by the Legislature, they have evolved a body of case-law which is followed as precedents in very much the

(a) Goodnow, *Comparative Administrative Law*, Vol. I, p. 85; Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 45-46.

same manner as judicial decisions are followed in England (a). The consequence is that whilst in England Courts have for reasons already explained virtually ceased to produce new rules of administrative law, unless by way of interpretation of existing statutes or ordinances authorised thereby, French Administrative Courts have entered upon a career of active origination of administrative norms, comparable only to that of English Courts during the later Middle Ages. Development in other Continental countries where the system of Administrative Courts prevails has followed on somewhat similar lines.

In other countries on the European Continent.

22. As was to be expected from the thoroughgoing loyalty of the framers of the American Constitution to the doctrine of separation of powers as enunciated by Montesquieu and Blackstone, the sole source of rules of administrative as of other law, so far as the same is recognised in the Constitution, is the Legislature which of course can delegate this power, as in fact it has done in a variety of matters, to the executive. The executive consequently can, as in England and France, issue administrative ordinances under powers delegated by statute (b).

In America.

(i) Legislature ultimate source.

(ii) Executive ordinances under delegated statutory authority.

23. Owing, however, to the fact that the powers of the legislature itself are under the Constitution limited, and the limits are not laid down (as was indeed not possible in a document of its size nor advisable in one of its nature) either with precision or in detail, the Judiciary in the United States exercises a far larger influence in moulding the administrative law of that country than perhaps the Judiciary of any other Country. Both in England and in the United States (and this is true of English Colonies and Dependencies) the decisions of the highest Courts are loyally accepted by the other departments of Government as of binding authority, whether these decisions be in their operation only interpretative, or supplementary, or even destructive of a rule of law framed by any authority other than the Sovereign legislature (c).

(iii) Judicial decisions—their importance in moulding administrative law in Anglo-Saxon countries.

24. For symmetry's sake, if for nothing else, I have to specifically mention another source which really is implied

(iv) Constitution as a source of administrative law.

(a) See *ante*, Lecture V, para 21.

(b) See Lowell, *Governments & Parties in Continental Europe*, Vol. I, p. 45.

(c) See Mc Ilwain's *High Court of Parliament and Its Supremacy*, Ch. IV.

In the States  
Governments  
of the Ame-  
rican Union.

in all that has gone before, viz : the Constitution itself. The constitution of a country, where it is embodied in a document, does not ordinarily lay down details of administrative law—nor indeed is that its proper function. Ordinarily it leaves the framing of rules of administrative law to the legislature (a) or to the executive subject to the control of the legislature (b). But that it can do itself what it may authorise its subordinate organs to do is beyond question. As a matter of fact in many of the revised Constitutions of the States composing the United States of America, detailed regulations concerning administration are found as a rule. The reason is that owing to peculiar party and other conditions, the men who get returned to seats in the local legislatures are such as the people cannot wholly trust—a condition of things which for the present at least is so abnormal that, for purposes of comparative study, the phenomenon of the Constitution itself being a direct source of rules of administrative law may be regarded as exceptional (c).

In India

(1) Ordinance  
power of the  
Government  
of India  
under Parlia-  
mentary  
statute.

25. Passing now to India, under section 71 of the Government of India Act of 1915, the Governor General in Council (in other words the Chief Executive in India) has power to make regulations for the peace and good government of any part of British India which the Secretary of State for India by resolution in Council may withdraw from the jurisdiction of the Governor General in his Legislative Council and these regulations when assented to by the Governor General and published in the Gazette of India or the local official gazette, if any, have the like force of law (d) and are subject to the

(a) E.g. in Switzerland. Lowell, *Governments and Parties in Continental Europe*, Vol. II p. 195, n2.

(b) For instance, the Bundesrath has this power under the German Imperial Constitution, Lowell *Op. cit.* Vol. I, 268, and the Princes of Saxony, Wurtemberg and Baden in their own governments, *Ibid*, Vol. I, pp. 335, 341, 345, the Ministry in Italy, *Ibid*, Vol. I, p. 165, in Austria and Hungary, *Ibid*, Vol. II, pp. 76, 138, 164. The Constitutions of Prussia (Art 45), Belgium (Art 67), Spain (Art 45), Italy (Art. 6), as that of France, expressly authorise the King to issue such ordinances as may be necessary to enforce the laws. In Prussia and Italy, the Executive, it appears, may make or alter laws by ordinance subject to confirmation by the Legislature. See Lowell, *Op. cit.* Vol. I, pp. 165, 290.

(c) See Bryce, *American Commonwealth*, Vol. I, Chs. XXXVII, XLII & XLV.

(d) See secs 32 (2), 65 & 84 of the Government of India Act, 1915.

like disallowance as if they were Acts of the Governor General in Legislative Council (a) ; and under Section 72, the Governor General may in cases of emergency make and promulgate ordinances for the peace and good government of British India or any part thereof, and any order so made has for the space of not more than six months from its promulgation the like force of law as an Act passed by the Governor General in Legislative Council, but subject to the like restrictions as the power of the Governor General in Council in Legislative Council to make laws (a), and any ordinance made under this section is subject to the like disallowance as an Act passed by the Governor General in Legislative Council and may be controlled or superseded by any such Act. Similar and even larger ordinance powers are possessed by the Executive in British Crown Colonies, not possessing representative legislatures.

Ordinance power of the Governor General under Parliamentary statute.

In Crown Colonies without representative legislature.

26. Besides these exceptional ordinance powers conferred on the Governor General in Council in the one case and the Governor General alone in the other, by the Government of India Act, the Executive in India of various grades and the High Courts also, as also various public authorities, exercise as in England and America large ordinance powers conferred on them by Indian statutes, passed by the Governor General in Legislative Council or by Local Legislatures. Amongst ordinances applicable to India are Orders in Council passed by the Home Government under the authority of English statutes. Courts in India, and also of course the Judicial Committee of the Privy Council, have the same power and authority in interpreting the statutes and ordinances as Courts in England ; and inasmuch, moreover, as the Legislatures in India are not sovereign law-making bodies,—their powers being expressly limited by Parliamentary statute—the Courts in India have authority to pronounce on the validity or otherwise of Indian statutes and ordinances passed by any authority under statutory powers. Thus the sources of administrative law in India are much the same as in England or America,

(iii) Ordinance power under Indian statutes.

(iv) Orders in Council.

(v) Judicial decisions.

27. Upon as wide a survey of the field as I have been able to make, the sources of administrative law appear to be the

The sources classified.

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(a) See sec. 68 of the Act.



following :—(1) Constitutional Law, (2) Statutes, (3) Executive Ordinances issued in the exercise of (i) independent constitutional powers, (ii) supplementary ordinance powers conferred by the Constitution, (iii) authority delegated by statute (a), and (4) Case law.

Constitutional Law and Conventions.

28. I have omitted to mention in the above enumeration one very important source of administrative law, viz, Constitutional Usages and Conventions. If these are taken, as they should be, to belong to the category of Constitutional Law, then Constitutional Law and Usage, taken together, must be assigned a place as a normal source of administrative law, for by allowing political and administrative functions to be performed by persons other than those named in the letter of the constitutional law and in a manner different from that implied in the language of that law, constitutional usage may affect the operations of government in the profoundest manner. Thus the executive government of England is by usage controlled and directed by a body (the Cabinet) which, it is stated, "is unknown to the Constitution". In the Federal government of the United States of America candidates for the Presidency and the Vice-Presidency are nominated by the National Political Convention, a body unknown to the American Constitution. So also is the Cabinet of the President. I need not multiply instances. But only in order to show that growth even of written constitutions beyond their original structure is not peculiar to the Anglo-Saxon people, I mention as instances those of Belgium (b), Italy (c) and even Germany (d)

Rules of constitutional practice distinguished from constitutional conventions proper.

29. Not every constitutional usage should be included in the category of constitutional law. Strictly speaking no usage which is not directly recognised and enforced as law by the courts can be regarded as such. But in so far

(a) I have taken this classification of executive ordinances from Goodnow's Comparative Administrative Law, Vol. I. p. 28-29. Personally, I would have preferred to include the first two kinds under a single head, viz: of "supplementary ordinances," as they must be under modern constitutional theory.

(b) See Ogg's Governments of Europe—Belgium.

(c) See Lowell's Governments & Parties in Continental Europe, Vol. I. p. 151.

(d) Dodd, Modern Constitutions, Vol I, p. 323.

as the non-observance of such rules must necessarily lead to breaches of law (a), such rules have ultimately a legal sanction, and they have to be taken into account in describing the constitution in its normal working. I cannot well see how it is possible to exclude constitutional conventions which must be observed at the risk of breaches of the law from a consideration of the sources of administrative law without laying oneself open to the charge of pedantry. Rules merely of constitutional practice, which may be observed or not as occasion may require, would of course have to be excluded, and they hardly deserve the name of "constitutional conventions." But constitutional conventions proper are quite different from rules of constitutional practice. They represent something more real than constitutional habits. They stand for necessary changes in the machinery of government to suit the demands of changed conditions of political life. In so far as they modify the letter of the constitution they are more truly laws than the fictions they modify. In such a case the letter of the constitution represents the convention, whilst the so-called convention stands for the fact. No better confirmation of the position I here take up is needed than the fact that what are constitutional conventions in one system are often embodied in the written constitutions in other systems, as have been done in the constitutions of several countries of Continental Europe and of the Self-governing Colonies of England (b).

30. As to Statutes, it is necessary to remember that statutes not framed by sovereign legislatures should be open to question on the ground of their being in excess of the powers of the legislatures concerned. No such question can arise with reference, for instance, to Statutes of the English Parliament which is a sovereign legislature. But, as already stated, the legislative powers of the American Congress as also those of the Legislatures of the States, though wide, are not unlimited and the American Judiciary have been frequently required to pronounce American statutes illegal and void on the ground of unconstitutionality. As similar limitations upon the power of the Legislature are imposed in most European countries

II.  
Statutes.

Constitutional limitations on the power of the Legislature.

(a) See on this point Dicey's *Law of the Constitution*, 6th Edition, Chap. XV.

(b) See Dicey, *Law of the Constitution*, 6th Edn, Chs. XIV and XV.

Nullified on  
the Continent  
of Europe.

other than England by their constitutions, similar developments might have been expected in those countries. But in those countries the power of the Courts to go behind statutes has been effectively shut out by the principle, often embodied in the constitutions, that the Legislature and no other authority is competent to pronounce finally on the interpretation of a Statute. In France, admittedly, Courts have no power to pronounce statutes unconstitutional (a). It is the same in Italy (b), in Austria (c), in Switzerland (d), and perhaps also in Germany (e).

Enforced in  
India and  
America.

31. As pointed out already, the Legislatures in India being subordinate and not sovereign legislatures, statutes passed by them may be pronounced illegal as in America by Indian Courts. Similar contingencies may arise in any of the Colonies and Dependencies of England.

III.  
Executive  
ordinances.

In what man-  
ner subject to  
review by  
Courts.

32. Regarding Ordinances, as they are at the present day everywhere framed by non-sovereign bodies and subject often to strict statutory limitations, they ought to be open to challenge in Courts of law, if administration according to law is not to be reduced to mere make-believe. So far as I can gather, in no country is it ordinarily permitted to institute suits or proceedings to *declare* executive ordinances illegal and inoperative, any more than it is allowed to institute similar proceedings of a declaratory nature concerning statutes questioned as *ultra vires* of the legislature. But where private rights (f) have been affected through the application of such an ordinance, the courts in every country having jurisdiction to entertain proceedings arising therefrom will refuse to enforce it. But whereas in England and its

In Anglo-  
Saxon coun-  
tries,

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(a) Lowell, *Governments & Parties in Continental Europe*, Vol. I, p. 13.

(b) *Ibid*, Vol. I, p. 151 & 175.

(c) *Ibid*, Vol. II, pp. 79 n2 & 84

(d) *Ibid*, Vol. II, p. 219.

(e) *Ibid*, Vol. I p. 282. For an explanation of the difference in the relations of the Judiciary and the Legislature in Anglo-Saxon countries and on the Continent of Europe, see Mc Ilwain's *High Court of Parliament and Its Supremacy*. Ch. IV.

(f) In one class of cases in France, e. g., those involving *actes d'autorité*, proceeding may be instituted in the Council of State, the highest administrative court, to annul ordinances, and this can be done not only by persons whose rights are affected but even by persons whose interests are involved. Lowell, *Government of England*, Vol II p. 498.

Colonies and Dependencies and in the United States of America, ordinary courts possess this jurisdiction, in countries on the Continent of Europe, where the system of administrative courts prevails, the jurisdiction of ordinary courts, unless specially allowed by statute, belongs to these special courts (a). There are also important differences in the results which follow from courts having jurisdiction under the two opposing systems being persuaded to hold in any particular instance that the ordinance in question is illegal. Decisions of Courts in the British Empire and in America are accepted as binding by the Executive, whereas in the other systems the authority of Courts to pronounce finally on the legality of ordinances is not recognised. The result is that whereas the decision of a Superior Court in an Anglo-Saxon country pronouncing an ordinance to be illegal has *ipso facto* the effect of setting it aside, the decision of Courts in countries possessing a system of administrative courts, however favourable to the individual litigant, has not that effect. In France alone is the Council of State authorised by the Constitution to pronounce ordinances invalid and that even at the instance of a party whose private rights have not been infringed, provided his interests were involved in it (b).

In Continental countries.

33. Another point in connection with the ordinance power given to executive authorities by statute, which may need further development, should be noticed in passing. On the principle "*delegatus non delegare*," such authorities presumably would have no power to delegate their ordinance power to subordinate authorities unless allowed by statute. No such restrictions bind subordinate legislative bodies since these are regarded, in English law at least, as sovereign within their limited spheres (c).

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(a) In Italy, where private rights have been affected, the ordinary courts have jurisdiction, but where private *interests* are involved, the matter has to be taken to administrative courts. See Lowell, *Governments & Parties in Continental Europe*, Vol. I, 175. In Austria, ordinary courts appear to have been given jurisdiction in these matters. See Lowell, *Governments & Parties in Continental Europe*, Vol. II, p. 79 n2.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 221, 222, 244, 248; Lowell, *Governments & Parties in Continental Europe*, Vol. I, p. 46.

(c) *Powell v. Apollo Candle Co.* (1885) 10 App. Cas. 282, 290; *Hodge v. R.* (1833), 9. App. Cas. 117, *R. v. Burah* (1878) L. R. 5 Ind. App. 178.

IV.  
Case-law.

34. As to the influence of judicial decisions in moulding administrative law, this varies in mode and operation in different countries and under different systems. Generally they operate in two ways which may be described as (i) Formative and (ii) Regulative. I have already shown how formerly English Courts developed rules of administrative as of private law, as parts of one and the same system of Common law, by judicial decisions, and how again at this moment Administrative Courts in countries where a system of Administrative Courts prevails are engaged in a similar way in evolving principles of administrative law to fill up gaps in statutory rules and ordinances, and how further in America the paucity of details and want of precision in the Federal constitution have led the Supreme Court in that country to build up important principles of administrative law which, nobody can fail to see, are very far from being merely interpretative. These would be instances of the formative activity of the Judiciary in shaping administrative law. In so far, however, as the Judiciary interprets and reviews administrative statutes and ordinances and refuses to enforce them on the ground of illegality or declares them to be inoperative, the operation of the Courts may be said to be regulative. As to the varying modes in which judicial control of both kinds is exercised and operates in different countries and under different systems, that must be reserved for consideration in a later portion of the book (a).

(i) When  
formative.

(ii) When  
regulative.

Mere office  
regulations  
not adminis-  
trative law.

35. The practice of administrative authorities, not erected into Courts, of hearing appeals even at the instance of private individuals from acts of subordinate authorities, and instructions issued by superior authorities for the guidance only of their inferiors in the service (b), though they may be reduced into writing and habitually observed, are not rules of administrative law; and office regulations, by themselves, since they will not be enforced in Courts of law, and may be observed or not by the executive at pleasure, do not constitute

(a) See Lecture XXIII *infra*.

(b) As to this, See Lowell, Governments and Parties in Continental Europe, Vol. I, 44; and Goodnow's Comparative Administrative Law, Vol. I, p. 157.

a source of administrative law. Of this character are the "Petition rules" framed by the Government of India, referred to in Chapters IX and XVII of the Decentralisation Commission's Report (a).

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(a) It may perhaps be added that proceedings of administrative tribunals, when these are not presided over by independent judges, even though they may observe some sort of judicial form, can differ but slightly from proceedings under rules of office just considered. This is admitted even by Mr. Goodnow who is an appreciative student of Continental administration. An administrative tribunal, he suggests, is not a Court when its members may be summarily removed by the executive and when its orders and judgments are not capable of immediate execution without being subject to review by any but a judicial authority of the same character. See his article on "Courts and Tribunals, Administrative" in the *Cyclopedia of American Government*. Administrative law would not have assumed the importance it has recently done as a subject of study on the Continent of Europe, had it not been for the improvements effected in the constitution, personnel and procedure of Administrative Courts during the last century. See Lecture XXIII *infra*.



# BOOK II.

## SUBSTANTIVE ADMINISTRATIVE LAW.

### A. ORGANISATION OF THE ADMINISTRATION.



#### LECTURE VII.

### ORGANISATION OF LOCAL AUTHORITIES.

#### *(I)—Introductory.*

1. The days of City-States are past. All modern States are and in fact have to be "Country" States or, to be more accurate, "Territorial" States, complex organisations comprising cities as well as countries. Nor do they necessarily comprise compact territories within a circumscribed boundary. The greatest (England) and the smallest (Belgium) of the States of Europe, to speak of no others, have a colonial empire beyond the seas.

Modern States all Territorial States.

2. Nor is it a difference in area only. Governments of modern States are faced with problems and have responsibilities which never vexed the souls of the patriots of ancient Greece or the podestas of Medieval Italian cities. Even when the questions demanding solution are similar in kind, they assume today a complexity which they never had in the spacious days that are now past.

3. The problem of area is however by no means a modern problem. We have passed under review the political organisation of several territorial States of Ancient and Medieval times. These, I have previously shown, inclined towards either (1) the Bureaucratic or (2) the Feudal form. The common feature of both was a division of the kingdom or empire into smaller local areas and the handing over of the administration of these areas to agents with authority to exercise the functions of government within their jurisdictions. The difference lay in the preservation in the one case of effective central control over the delegates in the localities and its virtual negation in the other. The very absence of central control in the

Ancient and Medieval territorial States, either bureaucratic or feudal.



feudal organisation tended to make the office of the delegate hereditary, and under favourable circumstances even vendible. But hereditary tenure was by no means a necessary concomitant of Feudal officialism. Appointed officials formed in the main the personnel of that organisation in Ancient Persia and Mahomedan India, thus implying a somewhat greater degree of central control than there was over the hereditary organisation of Western Europe (a). Everywhere it was marked by a more or less complete decentralisation of public authority so far as the Supreme power in the State was concerned and its concentration free from central control in the hands of local officials whether hereditary or appointed. This form of government in all its manifestations has been so thoroughly condemned by history, that it is little short of surprising to find recommendations to re-establish it in some form or other seriously discussed in State and other documents in British India.

Feudal polity  
condemned  
by history.

4. A bureaucratic form of government is without question superior to the feudal. It is decidedly less capricious, more honest, more scientific and more efficient. It resists organised external aggression and internal disorder better than either personal rule (which is apt to suffer with the personality of the ruler) or feudal government. But that bureaucracy, pure and simple, is not the last word in political organisation is proved by the failure of the Egyptian, Roman and French bureaucracies, the deliberate weakening of it in its modern home, Prussia, from a conviction firmly held by the greatest of her statesmen, Prince Bismark, that it is unsuited to modern requirements, and the complaints repeatedly urged

(a) Referring to the form of government which prevailed in India prior to the acquisition of the Dewani of Bengal by the East India Company, the Fifth Report of 1812 said: "Asiatic governments inclined to the establishment of individual authorities in gradation from the sovereign downwards to the village *mokadam* or *mondal*". These were of course (except perhaps the *zemindar*) centrally appointed officials. Lord Wellesley is stated in the report to have "framed his first institutions" in the ceded districts of Oudh "on the model of native governments" by allowing "the entire authority for the collection of the revenue, the administration of justice and the preservation of public peace to be centred in each individual civil servant appointed to supervise each provincial division. See Ascoli's *Early Revenue History of Bengal*, pp. 185-200,

by officials and non-officials alike against the excessive centralisation of public authority in Modern India.

5. If the feudal and bureaucratic organisations of the types previously considered were the only alternative forms of government to-day, the world might well have despaired of its political future. They were not the only possible forms of government even in times that are now past, for the Venetian Empire was in character neither feudal nor bureaucratic. I think, I have succeeded in showing that whilst the greatness of that empire at its highest was in no small measure due to her political organisation, causes outside and independent of that organisation compassed her fall. But even before the star of Venice had reached its zenith, an experiment in government-making of a more universal application was being carried on in England. It was to take several centuries to mature into working institutions, but when these came, other nations took up the work each in its own field. Much progress has undoubtedly been made and is being made at this moment, but if doubts and difficulties in regard to the results achieved or believed to have been achieved assail us, it is because we happen to be still in the thick of the experiment. One thing however appears to be clear, that neither feudalism nor officialism is ever to return in the forms in which we have known them in history.

The Venetian Empire neither feudal nor bureaucratic.

England leads the way to a new form.

6. What all modern experiments in government-making may be said to be aiming at is to reconcile local autonomy with central control on the one hand and officialism with popular control on the other.

Its aims.

## (II). *Organisation of Local Authorities.*

7. What are or should be the local units of government at the present day? How are or should these be determined in modern governments? In this respect, modern governments present instructive contrasts to the feudal and bureaucratic governments of the past.

Local Government units of modern Governments.

8. In an ideal feudal State of Western Europe every fief would constitute by itself a seignior—all the governmental functions within the estate being concentrated in the hands of the seignior. Each would comprehend a number

Local units in Feudal States.

The village  
communities.

of villages, the ultimate local atoms of all feudal estates, each of such villages being a nearly self-contained agricultural community with its cultivated fields and commons and domestic industries. There is evidence that though the cultivators were mostly reduced to the position of serfs or were otherwise brought into individual (contractual) relationship with the lord, no feudal government actually succeeded in absolutely destroying the village communities, and throughout the feudal age and the centralised monarchic regime that followed, the rural communities remained in a state of suspended animation ready to spring into life as soon as conditions became favourable. The towns, as previously explained, had strictly speaking no place in this purely agricultural organisation of lords and tenants, and had to fight or pay to obtain a semi-independent status within it. No wonder, feudal lawyers were constrained to treat "each town as *sui generis*, an awkward anomaly, a privileged abuse" (a).

Towns.

9. The Medieval State thus comprised fiefs containing within themselves a number of rural communities controlled by the seignior, and municipal communities whose partially independent existence found expression normally in their charters. Several fiefs would sometimes come by devolution or otherwise into the same hands. When this happened the fiefs did not merge. The union was a purely personal one so far as the lord was concerned, but the fiefs remained distinct and each continued to be governed by its own laws and customs and administered separately from the others. In feudal Europe, the counties, towns and to some extent rural communes thus formed natural units which the law did not so much choose as it was constrained to recognise (b).

Fiefs.

Counties,  
towns and  
rural com-  
munes his-  
toric admin-  
istrative  
units.

Local units  
in bureaucra-  
tic govern-  
ments mere  
administra-  
tive circum-  
scriptions.

10. The tendency of officialism on the other hand is to disregard history and tradition and make local divisions subserve the conceived ends of the administration. The best

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(a) Davis, *Medieval Europe*, p. 215.

(b) See Redlich and Hirst, *Local Government of England*, Vol. I, pp. 5, 13, 228. Pollock and Maitland's *History of English Law*, 2nd Edition, Vol. I, pp. 535, 558, 564, 636. Counties, hundreds, townships and boroughs were legal units, at least in England, though far more often for the purpose of being bearers of duties than of rights and appearing before the Courts chiefly as "punishable units," p. 688.

illustration of it is to be found in the division of the Roman empire, already noticed, by Diocletian and his successors. The ruling motives of this Emperor are stated to have been (1) to protect the frontiers, (2) to obviate the possibility of revolt on the part of powerful provincial governors, and (3) to make every part of the empire bear its share of the increased expenditure of the new organisation. The result was the cutting up of the Empire into more than a hundred provinces, so small that the governor of not one of them would be sufficiently powerful to make a successful bid for the empire and which necessarily disregarded all historical and ethnic considerations, and the division of each province again into minutely mapped out taxing areas within defined boundaries not many of which would be regarded as in any sense natural divisions.

In the Roman empire.

Disregard of historic and ethnic considerations.

11. The political and administrative divisions of France under the monarchy show a quite comprehensible admixture of feudal and bureaucratic elements. The bailiwicks and seneschalships corresponding to large and small seigniories were of feudal origin, as were also the "governments" or provinces which were identical with or analogous to the great fiefs and were in strict relation to the geographical configuration of France. With the progress of bureaucracy, these organisations were deprived virtually of all importance. The former were reduced to judicial and electoral divisions, whilst the latter became, like the Lord Lientenancies of England, little more than ornamental. The "generalities" and "elections," presided over by the Intendants and Sub-delegates, which superseded them were more or less artificial divisions which originated like the districts of India as taxing units. "Within these limits, cities and communities of inhabitants formed special units in which was maintained for a more or less long time a regime of self-government recalling to some extent that of England" (a).

Admixture of forms in France.

12. It was characteristic of Medieval English polity to regard counties, town and villages (later known as parishes) not merely as administrative circumscriptions but as legal entities. I pointed out in another context how in England alone amongst European countries, Royal power succeeded in

In England, counties, towns and parishes, "Common-law" units.

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(a) Brissaud, History of French Public Law, Ch. XI.

Not modifi-  
able by exe-  
cutive will.

King's Com-  
mon law  
power to in-  
corporate  
town given  
up.

Early *laissez-  
faire* attitude  
of Parlia-  
ment in this  
matter—Pri-  
vate Bill  
legislation.

consolidating itself through a centralised judicial organisation whose competence extended as well to the affairs of the subjects as to those of the King and his servants. I explained how the "Common law" of the Royal courts was able to take upon itself to define the scope and limits equally of the State's and subjects' rights. It was the same Common law of the Royal courts which proceeded to define the nature and limits of the the local administrative units, the counties, towns and parishes (a). These units, in other words, were woven into the texture of the administrative law of England, from which followed the important consequence that the combined historical and Common law organisation could be modified only by means known to law and not by mere executive will. The Common law however recognised the power of the King to incorporate towns by charter. Edward III, the father of English local self-government (b), and kings before and after him had frequently incorporated boroughs to enable them to hold property in their corporate capacity and to sue and be sued. The Tudor and Stuart Kings abused this power and incorporated new towns with the object, through them, of controlling the elections to Parliament. The power, exercised for the last time by Charles II, was abandoned on the opposition of Parliament (c). Henceforth the only recognised method of organising local authorities was by Parliamentary legislation and this was done chiefly through what is known as Private Bill legislation (d). Parliament thus came to have exclusive power of altering as well as constituting localities for purposes of local government.

13. Up to 1834, however, Parliament, not having had any special purpose to serve, maintained a strictly *laissez faire* attitude towards local government organisations, and interfered, if at all, under legal form in accordance with the judicial procedure of Private Bill legislation at the instance of individual promoters and after according judicial hearing to the objections of the opponents of the measures (c).

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(a) Redlich and Hirst, Local Government in England, Vol. I, pp. 5 and 13.

(b) Justices of the Peace date from the Statute 34 Ed. III, c. 1. Odger's Local Government, p. 206.

(c) Redlich and Hirst, Local Government in England, Vol. I, pp. 28, 34.

(d) See as to this Lowell's Government of England, Vol. I, Ch. XX.

(e) Redlich and Hirst, Local Government in England, Vol. I, pp. 37-42, particularly p. 40.

14. I have previously explained how the original communal organisation of the boroughs had deteriorated into a close corporation of privileged persons who used their privileges against the public interest and to their own benefit. The county organisation in England, on the other hand, through the institution of the Justices of the Peace, had early in her history passed from under the control of paid Royal officials to that of unpaid local magnates. The services of the latter were rendered cheaply, honestly and on the whole industriously. But between the date of the last Stuarts and 1834 had occurred in England the greatest known economical change of history, compendiously styled the Industrial Revolution, and between them the corrupt town corporations and the honest but old-fashioned Justices were unable to meet the requirements of "the severer and more elaborate conditions of a densely populated industrial empire". The reports of two Royal Commissions, one on the administration of the Poor law and the other on the condition of the boroughs, created such a deep impression on the members of the reformed Parliament, that they proceeded forthwith to re-organise the local administration in towns and counties in a fashion so drastic as to have done honour even to a Roman emperor. New Poor law areas were created with new governing authorities in utter disregard of all traditional and historic considerations (a). The next year, Parliament created new Highway districts which did not agree even with the Poor law districts created in the previous year. Two epidemics of cholera in 1847 & 1848 led to the creation of sanitary districts which did not agree with either the Poor law or the Highway districts. In a similar fashion there grew up Burial Board districts, Improvement districts, School districts, these last in 1870. Different authorities constituted for different areas for different purposes naturally resulted in administrative "chaos" and a "jungle of jurisdictions" which caused both confusion and waste. Between 1870 and 1902, continued efforts towards unification of areas and authorities led not merely to simplification, but a return within practical limits to historic units, on neither point complete but still plainly perceptible. The Municipal Act of 1835 and forty-two amending enactments all consolidated

Local units  
organised by  
Parliament  
without re-  
gard for his-  
tory and  
tradition.

Restoration  
of historic  
boundaries  
in recent  
years.

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(a) Odger's Local Government, p. 20.

into the later Act of 1882 had meanwhile thoroughly overhauled the government of the boroughs and built them up on a democratic representative basis. The Local Government Acts of 1888 and 1894 between them constituted four kinds of corporate units in the rural area, which was thus "municipalised", the government of these areas being transferred from the Justices of the Peace to elected councils and, in one class of cases, to town meetings. The resulting local divisions in England all democratically organised are thus, broadly speaking, (1) Boroughs (Municipalities) (a), (2) Counties, the latter being divided into districts which are either (3) Urban or (4) Rural districts, the rural districts again being divided into a number of self-governing civil (5) parishes. All these are corporate bodies. For poor law and certain other purposes exists another unit, also incorporated, the creation of the Poor Law Act of 1834, viz: the Union, which may be composed of one or more parishes. The local authorities for these Unions are the Boards of Guardians locally elected. Paid permanent officials serve these councils, and indirectly guide but do not control them. But the important point to note in the present connection is that unlike the provinces of Diocletian or the Generalities and Elections of the Valoises and Bourbons, these units exist not by virtue of executive will but by force of Parliamentary legislation. The Local Government Board and County Councils have statutory authority to alter the boundaries of the smaller units but the boundaries of boroughs and

Local Units  
in England  
still legal.

(a) It will be necessary later on for purposes of comparison to refer to the mode in which new boroughs may be constituted under the Municipal Corporation Act. If the inhabitants of any place wish to have it incorporated as a Municipality, they must address a petition to that effect to the Privy Council. Notice of the petition must be sent to the Council of the County in which the place is situate and also to the Local Government Board. The Privy Council will appoint a Committee to consider the petition, who will visit the place from which the petition comes and there see and hear for themselves the arguments pro and con. All representations upon the subject by either the County Council or the Local Government Board must also be considered. If the petition be granted, the Privy Council issues a charter of incorporation to the place, arranging for the extinction of competing local authorities, setting the limits of the new Municipality, determining the number of its Councillors and often even working out its division into Wards. Once incorporated, the town takes its constitution ready made from the Act under whose sanction it petitioned for incorporation. Woodrow Wilson, *The State*, p. 420. Blake Odgers, *Local Government*, p. 81.

counties can be changed only with Parliamentary sanction (a).‡

15. One other outstanding feature of this legislative reorganisation has to be noticed. It is the establishment of a central controlling agency which has been charged almost reluctantly with certain powers of direct and other more indirect administrative control over the rural authorities, and, over the Municipalities, with certain powers of negative control of which more will be said in a later lecture. (b)

16. The "municipalisation" of the county organisation of which but the briefest account has been given above has had important legal consequences. Neither the county nor the parish, though administrative units in fact, were before their incorporation by statute bodies corporate. They could neither sue nor be sued as such. The local officials who performed administrative duties were personally responsible for any infraction of the law they might be led to commit in the discharge of their duties, in the same way as they would be responsible for their personal wrongs (c). Nobody else could be made vicariously responsible for these wrongs. The Justices of the Peace were no doubt appointed by the State, but the State under English law can never be held responsible for its agents' torts, a position which may not appear incomprehensible if it be remembered that in an administration professedly founded on and intended to be consistently worked by the "rule of law", the State which thus cannot be supposed to wish to do wrong cannot also be taken to authorise any of its agents to do wrong, even by implication (d). The risk and

Legal position of the counties, parishes and their officials before their incorporation by statute.

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(a) See Local Government Act of 1888, secs. 50-63.

(b) Lecture XX, *infra*.

(c) The Justices of the Peace when acting judicially within their jurisdiction would of course not be liable so long as they acted *bona fide*. This I shall discuss later when dealing with the subject of judicial immunity. See Lecture XVI *infra*, para 29.

(d) Halsbury, Laws of England, Vol. VI, pp. 374, 383, 412-7, Vol. XXIII p. 316. The statement apparently to the contrary in Vol. XXVII p. 477 would be wrong unless read with the foot-note (q). This conclusion would have necessarily followed from the premises, if the Crown was frankly recognised in English law as a body corporate, on the principle that a corporation cannot be held liable for even an expressly authorised act of its agent which the corporation would not in any circumstance be authorised to commit. *Poulton v. London and South Western Railway Co.* (1867) L. R. 2 Q. B. 534 at p. 540. But the principle itself is of doubtful validity, see *infra* Lecture XX, para 65.



responsibility were entirely theirs to exactly the same extent as were those of the churchwarden, the elected officer of the parish. Any public properties vested in them they held only as trustees (a).

Legal position of towns—not regarded as public authorities.

17. But the towns were bodies corporate. They were ordinarily so constituted by charters and when no charter could be produced courts were ready to presume one in their favour (b). They could sue and be sued as any bodies corporate, but though they performed administrative functions they were never regarded in English law as agents of the State for that or any other purpose any more than were the feudal vassals who exercised jurisdiction within their own estates. That it should be so may seem extraordinary to-day, but there were obvious reasons in the Middle Ages for the towns and boroughs being treated as absolutely independent legal units. So far from being regarded as instruments of the Royal will, they were interlopers who forced themselves into the State-scheme from outside. The feudal lord or King and the feudal lawyer had no inducement to consider them to be more intimately related to the State than any individual subject or vassal.

Legal position of the incorporated counties and other rural corporations.

18. On being incorporated by the Statutes of 1888 and 1894, the counties, districts and parishes were placed on the same footing as the boroughs, with the consequence that they are not treated in law, any more than the boroughs, as agents of the Crown. From this it follows that these corporate bodies equally with the boroughs are liable for the torts of their agents and may not take up the defence that their agents like themselves are servants of the Crown, and that in the absence of special authorisation, a superior agent of the Crown like themselves is not responsible for the torts of an inferior

(a) Halsbury, *Laws of England*, Vol. XIX. pp. 250, 251, 363. Were churchwardens common law corporations *virtute officii*. *Ibid.* Vol. VI., p. 492. On the different consequences respecting the liability of such property for the official's torts, according as it is taken to be held by them as trustees or as quasi-corporations, see H. A. Smith's *Law of Associations*. *Pace* the author's note at p. 21, has not the case of *Taff Vale Ry. Co v. Amalgamated Society of Railway Servants*, (1901) A. C. 426, recognised a distinct quasi-corporate status? See pp. 70-74.

(b) Redlich and Hirst, *Local Government in England*, Vol. I, p. 2.

official (a). It follows also that, no more than private corporations and subjects, are they bound by their constitution to take orders from the central executive authorities who are not their masters. Whatever control the latter are to exercise must be authorised by statute, and Parliament itself, unless driven by necessity to do so, is as chary of interfering with their freedom as with that of any private individual. I think I may hazard the opinion that the growing administrative control of central authorities over the actions of local bodies is but another phase of the growing recognition of the latter, not indeed yet legally, but practically, as agents of the administration. In fact we have got into the habit of describing them even in law treatises as "public authorities" (b).

Local corporations regarded in law as "private" rather than "public" corporations—Growing recognition of their public character.

19. By way of contrast, it may be pointed out that in France and Germany, Royal agents succeeded in imposing themselves on the local units so completely, that their reconstruction in recent times on a decidedly popular basis has not prevented them from being regarded as agents of the central power for purposes even of local government, thus inviting unlimited interference on the part of the central authorities in local affairs—an interference which is great or small according to the discretion of the responsible central authority, checked if at all by the administrative control of still higher authorities and in some cases by administrative courts. (c).

In France and Germany, local corporations regarded as public corporations.

20. To trace briefly now the organisation of local units in France, I have said already that the "generalities" and "elections" of the monarchy were artificial divisions. In 1789 when the National Assembly stepped into the seat of power, it made a clean sweep of existing divisions and redistributed

History of the organisation of local units in France.

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(a) Halsbury, Laws of England, Vol VI, p. 416, Vol. XXIII, page 322 and note (s), Vol. XXVII, pp. 480-1, Vol. VIII, pp 386-90.

(b) The cases which have allowed an information in the nature of *quo warranto* in respect of some offices and disallowed it in other cases, on the ground that they do or do not satisfy the test of being an office of a public nature appear to me to be highly instructive as illustrating this tendency. They will be found collected in notes (i) and (l) to p. 129 of Vol X, Halsbury, Laws of England (Title, Crown Practice).

(c) Redlich & Hirst, Local Government in England, Vol. I, p. 40; and Goodnow, Comparative Administrative Law, Vol. I, pp. 292-294 (as to France) and Vol. I, pp. 336-338 (as to Prussia).

Though created by law, they have been by law made subordinates of the Central executive.

the territory into a number of Departments even more artificial. The assembly however also revived the communes, the smallest natural local units, on a self-governing basis. These divisions like those of England just considered are creations not of executive will but of legislative enactment. So are the Districts (created for administrative purpose only) and Cantons (judicial and military districts). The heads of the Department, the District and the Commune are respectively the Prefect, the Underprefect (who are professional officials appointed by Government) and the Mayor (who is elected by the Communal Council) and with each is associated a locally elected Council. But only the Department and Commune have been made bodies corporate. Both rural and urban Communes in France are governed by the same law. The cities of Paris and Lyons have special organisations which are less democratic than that of the communes, and the departments of Paris and Rhone are subject to greater central control than the others. The character of the municipal government of the Departments and Communes has undergone varied changes since the date of the Revolution, the immediate effect of which was to place the affairs of the localities under the control of independent local bodies. In 1800, however, Napoleon placed each Department with its constituent Communes under a professional officer, the (aforementioned) Prefect, who revived and continued the despotic traditions of the Intendants (a). The outward form of the organisation as also the theory underlying it [viz: that all power whether exercised in the localities or at the head quarters are derived from the centre (b)] have been maintained intact up to the present day, notwithstanding the establishment of a representative national legislature which can hardly be accused of not knowing its power. The fact is that the traditional bias of the French people in favour of centralised government has proved so strong that the Legislature, though it has not hesitated to reorganise the local administration to suit its views, has left the relative position of the central and local authorities materially unaffected. Its spirit rather than its form has been modified in two distinct ways: "First, by means of 'deconcentration,' that.

Recent changes.

(a) Brissaud, History of French Public Law, p. 412.

(b) See Brissaud, History of French Public Law, p. 323, pages 335-337.

is, by giving to the local agents of the Central Government a greater right of independent action, so that they are free from the direct tutelage of the Ministers ; secondly, by a process of true decentralisation, or the introduction of the elective principle (a) into local representative bodies" (b). Of the powers of the General Council of the Department and the Communal Council, it is stated that these have been given by the Acts of 1871 & 1884 respectively as wide powers as if the law had "simply granted to them each in its sphere the general power of local government." All three Councils, the General Council, the District Council and the Communal Council, have further been made by law Councils of advice to the Central Government which in many matters are obliged to ask their advice, though not bound to follow it. The General Council has by the law of 1871 been also given powers which relate not to the Department administration but to the general State administration, as well as certain supervisory powers over the administration of the Communes within the Department. Both the General and Communal Councils are subjected to quite considerable administrative control on the part of the central authorities with a right of appeal in many matters to the administrative courts. Before the Act of 1871, the General Council which ordinarily meets only twice a year exercised little influence on the local administration notwithstanding its large statutory powers. The Act of that year established a permanent executive organ of the council in the Departmental Commission the members whereof were to be elected by the General Council from its own body and were to serve without salary. Their main duty is stated to be to control the administration of departmental interests by the Perfect.

21. The net results of this organisation have been variously appraised. The duties of the Communal Council admittedly relate almost exclusively to the local affairs of the Commune, <sup>their effect.</sup> its general duties being so few in number and so unimportant in character as not to deserve special notice. Of the powers of the General Council, one author says, "it exercises more control over the affairs of the Department than has the County authority over the affairs of the County in the United States

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(a) This had been taken away by Napoleon.

(b) Lowell, *Governments and Parties in Continental Europe*, Vol. 1, p 35.

or even in England" (a), Whilst the estimate of another is that "in general it may be said that in matters falling within its province the General Council cannot do everything it wants, but can prevent almost everything it does not want. Its financial resources are not large and its attention is confined for the most part to the construction of roads, subventions to rail roads, and the care of schools, insane asylums and other institutions of a similar character" (b). The points however which need special emphasis in the present context are (i) that the local units in France, like those of England, now possess a Parliamentary status, (ii) that the devolution of power to them is general, and not regulated in minute details by express provisions laid down to that end in legislative enactments, (iii) preponderant central control. The result is stated to be that local authorities in France have a larger measure of autonomy than those of England, being less hampered by detailed legislative regulation, at the same time that they are less decentralised, being subject to constant surveillance on the part of the administrative authorities to the end that they may be kept within the limits of their legal competence and financial capacity.

History of the  
organisation  
of local bodies  
in Prussia.

22. The organisation of local administration in Prussia is even more artificial than that of France. The reorganisation of feudal and post-feudal conditions to suit modern requirements, which was effected for France by a patriotic National Assembly, was taken up shortly afterwards in Prussia by hard-thinking bureaucrats taught in the school of adversity, Prussia having in fact failed to evolve a national legislature before 1850. The existing local units, cities and rural communities were maintained and allowed to retain their autonomous organisation, but over them was imposed a new organ of official control, the Government District. The older and larger unit of the Province remained and the still smaller circumscription, the Circle, which formerly stood between the Province and the public corporations, were reorganised and

(a) See Goodnow's *Comparative Administrative Law*, Vol. I, Book III, Ch. VI, p. 283.

(b) See Lowell's *Governments and Parties in Continental Europe*, Vol. I, pp. 35-41.

made subject to the Government District (a). There were several defects in this organisation of which two only need be mentioned here. First, the boundaries of the administrative circumscriptions for the purposes of central administration, *viz* : the Provinces, Government Districts and Circles, did not correspond with the boundaries of the autonomous public corporations. Secondly, the control which the official body in the former exercised over the latter was so thorough that there was very little local independence in fact, and that control was further liable to serious abuse for partisan purposes (b) at the instance of the class which might obtain control over the central administration. To remedy the defects Prince Bismarck, with the collaboration of Dr. Gneist, framed certain proposals which, between 1872 and 1883, he persuaded the Legislature to accept, if not wholly, at least in substance. The features of the new organisation which require notice in the present connection are : (i) That the boundaries of administrative circumscriptions for purposes of central administration were made to coincide with those of the public corporations. (ii) An attempt to consolidate the local and central authorities into single bodies corporate succeeded in the Circles (Counties) but failed in the Provinces. In the latter the conduct of matters of local administration was vested in an elected Provincial Diet which controls an executive Provincial Committee elected by itself. Business of central interest is in the hands of the Governors of the Province and the Presidents of the Government Districts, who are required, in matters which may affect the rights and interests of the local public rather intimately, to act in concurrence, each, with a specially

Organisation  
of the  
Provinces.

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(a) Alongside the Communes there were some manors, each administered by its Lord—a remnant of feudalism which still exists.

(b) Class differences, which disappeared slowly in England and was destroyed violently in France, survive in Prussia. It is possible therefore in Prussia for a class by securing a majority in a representative legislature to obtain control over the Ministry, assuming that there is a Parliamentary executive. From 1850 to 1864, Prussia was ruled by such an executive acting at the beck and call of the landed interest, which abused their control of local officials, thus gained, so shamelessly, that the Regent had in the first place to repudiate ministerial responsibility to parliament—a feature which became permanent—and in the next to devise measures to lessen the influence alike of the landowners and their willing allies the officials. See Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 308-311, and Vol. II, pp. 63-9.

constituted council, the membership whereof is predominantly lay (being elected), a small professional element being deliberately included in it to secure rapid and wise discharge of business (a). The local authorities in the Province and the Circle are elective bodies corporate and enjoy a more effective measure of autonomy than those of France, subject as in France to control by the central authorities.

The Circles.

Police Districts.

Unions.

23. The Circles which correspond to the Counties of England are not, as already stated, the ultimate units. They themselves are somewhat differently organised for rural or urban areas. The laws of 1872-83 have also constituted new Police Districts presided over by unpaid Justices of the Peace, smaller in area than the Circles and consisting usually of a number of Communes. The Justice of the Peace (a somewhat clumsy imitation of the English functionary as he was before the Local Government Act of 1883—*minus* his judicial functions) acts under the supervision of the Circle (Executive) Committee. The inhabitants of the Communes embraced within the Police District are encouraged to form Unions which when effected are privileged to elect a representative assembly for purposes of local legislation as in the Circle and Province.

Composition of the local bodies.

24. The heads of the Province, the Government District and the Circle are all strictly professional officers. So is the Burgomaster of the City. The head of the Commune only (like the corresponding authority in France) is elected. The Councils of the Province, the Circle and the City are elected according to methods which are by no means democratic, for the suffrage is neither universal nor equal and is deliberately framed to secure representation not of numbers but of interests. It is in fact so framed as to interest only the propertied classes in the administration and these preponderate to such an extent that the poor take no interest in the elections and in consequence go to swell the ranks of the discontented (b).

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(a) Another body, the Government Board composed of the Government President and a number of other professional officers, which discharges certain other administrative functions, will be considered in another connection.

(b) The municipal suffrage in France is manhood suffrage and that of England also is very extended. The three class system of Prussia gives one-third of the representation to four men out of a city population of one hundred thousand in Essen. Lowell, *Governments & Parties in Continental Europe*, Vol. I, p. 328.

The Councils in the Province and the Circle work through elected executive committees, the Council of the City through an executive committee partly of professional and partly of unpaid lay members. The executive committees of the Circles and the Cities act both for the local bodies and for the central administration. The Rural Communes are really survivals of the old German townships. Amongst all these bodies the Circle Council possesses the greatest importance for it chooses, directly or indirectly, all the elective officers of the Circle, the Government District and the Province. The cities are subjected to rather more stringent central control than the other communities.

25. Prussian local administration appears on the whole to be more decentralised than that of France and possesses more local autonomy than that of England. It is said to have succeeded in enlisting in the public service the best classes of citizens. The union of the lay and professional elements has also, it is claimed, made for honesty, efficiency and economy in administration. But it has not, says Lowell, produced in the Cities the harmony between different classes which was urged as one of the chief reasons for the reforms (a).

A general estimate of the Prussian local organisation.

26. The local administration of the other German States need not be separately considered as they present variations of the Prussian and French types. That of Austria is still made up of the unregenerate Provinces and Circles we found in Prussia before the reforms of the last century, placed over the ultimate self-governing units, the Communes which according to the usual Continental habit are made use of also for Governmental purposes. The head of the Province is an official who supervises and controls the Provincial Committee, the executive organ of the Provincial Council (b).

Organisation of local administration in Austria.

27. In Sweden, the smallest units of local administration are the historic Communes which enjoy almost complete local autonomy. Over them have been imposed Counties of later origin presided over by officers appointed by the King, assisted by popularly elected Councils. Local government in Norway was reorganised in 1837 on the then existing French model,

In Sweden and Norway.

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(a) Lowell's *Governments and Parties in Continental Europe*, Vol. I, pp. 308-333.

(b) Woodrow Wilson, *The State*, p. 345.



consisting of Districts and Communes with representative Councils, over whom officials of the Central Government have exercised considerable powers of oversight and control (a). The local administration of the Netherlands Kingdoms is deserving of special study and its distinctive features are reserved for consideration in another portion of these lectures (b).

**In Italy.**

28. The organisation of local administration in Italy furnishes an instructive example of the circumstances of a country forcing on its rulers a form of government which their own personal inclinations would in other circumstances have led them to disapprove.

29. I have previously indicated how the old territorial divisions handed down to her from the Middle Ages operated to delay her union. When, after overcoming apparently insuperable obstacles, it became an accomplished fact, the first care of the statesmen of the Union was to provide against any tendency towards a disruption of this unity. This was the very reason that had led to the abandonment of the idea of a Federated Italy, and had induced even thorough-going Republicans to acquiesce in the monarchic rule of the House of Sardinia. The idea of organising the government of the localities on the basis of the old territorial divisions had therefore to be put aside, much as her representative men favoured the establishment of a decentralised system based on historic and traditional elements (c). Accordingly the French, rather than the English, form of administration was taken up as the model, and the Italian system of local government is a fairly close copy of the French. The development of local administration in Hungary from completely decentralised local autonomy, through an intermediate stage (in 1876) represented by the usual Continental admixture of local autonomy and central control, to a thoroughly bureaucratic form of administration (in 1891) is another illustration of the essentially relative character of political institutions. The reason why complete local autonomy proved injurious to the State in

**In Hungary**

(a) Woodrow Wilson, *The State*, pp. 359, 361.

(b) See Lecture IX *infra*, para 37.

(c) See Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 169-170. In 1868, the Chamber actually voted an order of the day in favour of decentralisation. *Ibid* p. 158, note. 1.

Hungary is, of course, to be found in the determination of an uncultured and arrogant landed aristocracy (a), from pride of race to preserve its monopoly of political supremacy with the consequent failure to supply the most elementary material requirements of modern administration. The self-administered Cities and Communes, however, appear to have satisfied this test better, so that these have not been deprived of all powers of self-direction. (b). What failed in Hungary has however proved quite successful in Switzerland whose Communes possessing each a homogenous population constitute real centres of political life. There are, besides the Communes, areas purely of State administration called Government Districts, the district officer who may be elected or appointed being assisted in some places by elected County Councils. The Swiss Communes are subject, of course, (as everywhere else on the Continent of Europe) to administrative supervision on the part of the Cantonal authorities, but are on the other hand free from that constant interference by means of special Acts of the Legislature which is such a common feature of local administration in the United States of America (c).

In Switzer-  
land.

30. The organisation of local government in the United States of America is the only one that I shall consider in some detail before I proceed to analyse the local government of India. It, I need hardly say, had its beginning in institutions transplanted across the ocean from England. Towns grew up spontaneously amongst the religious refugees of New England who grouped themselves as organised congregations, whose life was both spiritually and temporally organic. The Southern colonies were on the other hand settled by adventurous people of all grades, and the low and fertile soil encouraged the formation of large plantations worked by slave labour. Towns did not develop an independent local life in these colonies and they were organised for local government purposes into counties, (unincorporated

In the Uni-  
ted States of  
America.

(a) The Magyars, typical "die-hards" and "backwoods-men," of whom isolated specimens may be found in every country.

(b) Lowell, Governments and Parties in Continental Europe, Vol. II, p. 143-144; Woodrow Wilson, The State, p. 347.

(c) Woodrow Wilson, The State, pp. 313-314 Lowell, Governments and Parties in Continental Europe, pp. 235-237.

Towns &  
Counties.

Justice of the Peace districts as they existed in England before the Local Government Act of 1888), over which the towns exerted no influence. In the North too, the growth of a predominating urban population did not prevent the country from being organised into Counties mainly for judicial purposes after the manner of the Mother Country, but to this organisation the living town units contributed the governing element. In the Middle colonies a mixed organisation grew up, town and rural interests contributing nearly equally to the county organisation. In the States which were subsequently admitted into the Union, the Northern or the Southern type of organisation has been deliberately copied—the former in the North-west and the latter in the West. It is not necessary for our present purpose to go into details, but I should observe that the town organisations in the Northern States developed a form of self-government resembling that of the old German townships and, amongst existing institutions, that of the *Lands-gemeinde* (Rural Communes) of Switzerland with annually held town meetings of all qualified voters electing a number of officials who carry on all the functions of local government without interference by the county authorities (a).

Cities & Ur-  
ban areas.

31. "Counties & Townships are areas of rural organisation only. With the compacting of population in great towns and cities, other and more elaborate means of organisation became necessary and a great body of constitutional and statutory law has grown up in the States concerning the incorporation of urban areas. There is no complete or general Municipal Corporation Act in any of the States such as that under which, in England, cities of all sizes may acquire the privileges and adopt the organisation of full borough government. The largest towns are left to depend for their incorporation upon special acts of legislation. The large cities of the country consequently exhibit a great variety of political structure and even cities in the same State often differ widely in many material points of organisation and function. The electors or freeholders of less populous urban districts are in most of the States empowered (upon satisfying certain conditions as to population etc.) to obtain a simple form of incorporated urban powers, by certain uniform routine processes from the courts

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(a) For details, see Woodrow Wilson, *The State*, pp. 438-447, pp. 506-511.

of law" (a) "A common model of organisation for the smaller urban area is a mayor, president, or chief burgess ; a small town council given extensive power of making by-laws, considerable power of taxation for local improvement as well as local administration and other powers of local direction which quite sharply differentiate it from the merely executive boards often found in townships and always found in counties ; a treasurer, a clerk, a collector, a street commissioner ; sometimes overseers of the poor, and generally such other minor officers as the council sees fit to appoint". Cities are "often given a separate judicial organisation", "also larger councils with larger powers, a larger corps of officers and greater energy of self-direction than other local areas possess" (b).

32. The general features of the local administration in the States may for our present purpose be summarised as follows:—(1) Outside the towns and cities (the separately incorporated urban districts), there is a marked absence of representative law-making bodies. Almost everywhere local officers and boards have merely executive powers and move within narrow limits set by elaborate statute law. (2) Where there are local law-making bodies, they act under charters which define the scope and limits of their law-making powers. (3) Central control of local authorities exists only in the enforcement, in the regular courts of law, of charters and general law : there is nowhere any central local government board with discretionary powers of restriction or permission (c).

33. The Counties and Towns (not incorporated in the manner stated) are not in America bodies corporate. Their legal position is thus what the legal position of similar organisations was in England before the Local Government Acts of 1888 and 1894. Their officers, though elected by the people of the localities (in accordance with the method universally adopted in the United States of filling these positions), are simply viewed as central officers, functionaries of the State and not servants or agents of the Counties or Towns. These have in fact been judicially held to be "political divisions organised for the convenient exercise of portions of the political power

A general estimate.

Legal position of counties and towns and their officials in America.

Regarded as quasi-public corporations.

(a) Woodrow Wilson, *The State* pp. 518-519.

(b) *Ibid* p. 250.

(c) *Ibid* p. 523.

of the State." The county and town authorities hold property as trustees of the Central Government. Apart from general or special statutes, they have no borrowing power, and neither Town nor County can be held responsible for the torts of its officials, nor indeed can the State, since the State in America like the Crown in England can do no wrong. American judges have sometimes called Counties and Towns "corporations for special and very limited purposes," and lawyers, with greater regard for terminology, have called them "quasi-corporations" (a).

34. We have seen how in England, counties, rural districts and parishes have come to be "municipalised." In America, on the other hand, it is these that have reacted on the character of the city governments and lessened their position in the eye of law. Contrary to the traditions of English jurisprudence, the Municipalities in America have come to be regarded as organs of the Central Government for the purposes of the general Commonwealth administration, little distinction being made in this respect between Central and Municipal matters, and between incorporated boroughs and quasi-corporations like counties and towns. One result is that State Legislatures interfere with the organisation of the boroughs with just as much freedom as with those of the counties and towns, the only point where the corporate character of the former is taken to impose a restriction upon the constitutional power of the State legislatures is that the property of the boroughs (unlike that of counties and towns) is private property and may therefore, under the Federal constitution, be beyond legislative interference. "The town or borough," says Wilson, "is a public, not a private corporation, receiving by delegation certain powers of government" (b); and, as is usual on the Continent of Europe, the Central Government makes frequent use of the Municipality or its officers as agents for purposes of central administration (c).

Even Municipalities regarded as public bodies.

One consequence—excessive interference by legislature.

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(a) Goodnow, *Comparative Administrative Law*, Vol. I, pp. 171-177. On the subject of Quasi-Corporations, see H. A. Smith's note at p. 21 of his *Law of Associations*, and *ante* last note to para. 16 of Lecture VII.

(b) The State, p. 519. See Goodnow, *Comparative Administrative Law*, Vol. I pp. 202.

(c) Goodnow, *Comparative Administrative Law*, Vol. I, p. 203.

35. It would be wrong to say that the English Legislature has in theory less authority to interfere with city organisations than the Legislatures of the States in America. In point of fact what constitutional limitations exist in the case of the latter have no application to a Sovereign Legislature like the Parliament in England. But in matters of administration, practice often counts for more than theory. In England, except when the Legislature proceeds to enact statutes of general application (like the Municipal or the Local Government Acts)—in which case the merits and defects of the measure are canvassed through press and pulpit throughout the country—the only recognised method of modifying city charters is by Private Bill legislation with its formal legal procedure, which ensures a full judicial hearing of all objections on the part of the town-authorities and other persons interested in the measure. In America, on the other hand, city charters are not only modified by the ordinary legislative procedure, but changes are continually made without even asking the opinion of the city (a).

Interference of legislature of England (i) by general statute and (ii) by private bill legislation, more rational.

36. The mischief of this practice might have been less, if this excessive interference on the part of Legislatures with the affairs of the localities had been actuated always or even generally by well-meant, if mistaken, zeal for advancing public welfare. Unfortunately, owing to the peculiar party conditions prevailing in the States, the *personnel* of the Local Legislatures has so greatly deteriorated that whenever a measure of Municipal "reform" is placed before the Legislature, there are *prima facie* grounds for suspecting that it is framed to secure some private end. The constitutions of some States have in fact sought to provide against this by making it unconstitutional on the part of the State Legislature to pass any but statutes of general application. Even this, however, has failed to put an effective brake upon the legislative wheel in some States and a number of quite amusing instances of apparently successful efforts to get round such constitutional limitations is cited by Mr. (now Lord) Bryce in his "American Commonwealth" (b).

Legislative interference in American States not always well-meant.

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(a) Goodnow, *Comparative Administrative Law*, p. 205-6.

(b) See Bryce, *American Commonwealth*, Chs. XLIV & XLV. The "peculiar party conditions" are briefly those which make it possible for

American doctrine of immunity of local authorities in respect of wrongs committed in the performance of public functions—a departure from English law.

37. I have, in this connection, to remark that the participation by the local authorities in what is strictly central administrative business has led to the formulation of a principle, foreign again to English jurisprudence, conferring immunity on public corporations for damages caused to individuals by their governmental acts. Since, according to American legal theory, there is no certain test for discriminating between the public and the private acts of a Municipal corporation, and the trend of modern opinion is to find in every act of a public authority a manifestation of the power of the State, the tendency will certainly be towards making the area of this immunity as wide as that of the State itself (s).

Organisation of local administration in India.

38. The organisation of local administration in India presents features markedly dissimilar to any I have yet consi-

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“professional politicians”—those in other words whose only object in seeking a seat in the Legislature is to use it to obtain a living—to get returned in large numbers to the Legislature.

Municipal liability for tort in America

(s) Upon this topic of Municipal Liability for Tort, a writer in the Harvard Law Review for January 1917 (Vol. XXX, Number 3), p. 270-273, says: “The application of the rule has often been too broad and indiscriminating. The chief defect, however, is that the test is not self-defining, and is therefore no test at all...The test purports to be a permanent one, but being in fact ever-changing, it is ill adapted to the end of settling precedents. Thus if States extend their activities as far as have the cities into the domain of business—as seems very likely to happen under the present tendency—the conception of governmental, if properly applied, would cover all activities of the city. Otherwise it would become a mere historical commentary.” “A more special examination of the present state of the law” has had the following result: “Classed as governmental are the police, school, health, charities, and fire departments. On the other hand, water-works, gas, and electric plants, and toll wharves are everywhere recognised as municipal. Highway one would expect to be governmental; yet outside of New England, most American jurisdictions impose a common law tort liability here. Sewers would seem to be equally governmental, and in addition to be closely related to the health service; yet for failure to repair there is tort liability. The management of parks would similarly seem to be governmental, especially in the larger cities; on parks the authorities are divided. So also as to street cleaning and removal of ashes and garbage, there is a split in the cases. Although the repair of sewers is corporate, the maintenance of a city hall is governmental. But there may be liability during the erection of the hall; and the maintenance of a court-house is apparently municipal. If part of a city hall is rented there is the liability of a private owner for the condition of the premises, but if it be occupied in part by non-governmental departments, such as those of water and sewers, there is no liability”, “It is evident” adds the writer, “that the application to the facts of the distinction between governmental and municipal has been both difficult and obscure.”

dered. For a parallel which will not be altogether superficial, one has to go back to the constitution of the Roman empire during the Principate. The larger Provinces grew out of the exigencies of territorial expansion, due either to peaceful cession or conquest. That they would not strictly follow either geographical or ethnic distinctions is what might have been expected. The provinces owe their origin and their initial delimitation of boundaries to single political acts dictated by considerations of administrative expediency of a more or less temporary character. The temptation has accordingly been great on the part of the Indian executive to re-fashion these boundaries with reference purely to administrative needs and overlooking other considerations, most of which have been brought into existence subsequently to the original conformation of the Provinces. A certain amount of "local patriotism" has grown round these Provincial circumscriptions and has to be taken into account in proposing redistribution of territories—specially when these happen, as sometimes they do, to coincide substantially with ethnic or linguistic boundaries.

Origin of her Provinces in political acts.

"Local patriotism" a later growth but not wisely ignored.

39. Whether or not the Indian Provinces have everywhere succeeded in equal degrees in striking root in the sentiments of their inhabitants, they have at any rate been given a legal unity by the Parliamentary statutes which have determined the constitution of the Indian Government. Under part V of the Government of India Act of 1915 (which consolidates previous enactments), three Provinces (called for historic reason "Presidencies") viz: Bengal, Bombay and Madras are Governorships, four, viz: Bihar and Orissa, the United Provinces of Agra and Oudh, the Punjab and Burmah are Lieutenant Governorships, and eight, viz: Assam, the Central Province (with Berar), the North-Western Frontier Province, British Beluchistan, Delhi, Ajmeer-Marwara, Coorg and the Andaman and Nicobar Islands are Chief-Commissionerships. None of these provincial administrations can boast of an independent corporate or even quasi-corporate existence. They are agents of the central administration, and none the less so because some of them possess their own legislative councils, for these local legislatures are (as even is the legislature of the Government of India) wholly subordinated to the local and central executive and ultimately to the Secretary of State for India, and have been created not with the object,

Provinces "legal" units by force of Parliamentary statutes.

But not corporate or quasi-corporate entities, even when endowed with Legislative & Executive Councils.



Indian  
Government  
unitary.

through them, of conferring local autonomy on the provincial administrations but to secure a more satisfactory adjustment of the laws to provincial needs. The heads of some of these administrations have been given executive councils, but these operate only to regulate the exercise of such discretionary authority as they possess as delegates of the supreme executive and not to extend the scope of that authority. The recommendations of the Decentralisation Commission to increase the financial independence of the provinces and to strengthen their administrative powers within the framework of the existing constitution, even if fully carried out, will certainly not convert the Provinces into States and the Indian Empire into a federation of State (a). A fairly obvious test of the essentially subordinate character of the provincial administrations is furnished by Sec 60 of the Government of India Act of 1915 which provides for the alteration and re-constitution of provincial units by executive notification (b). In England, the boundaries of even a borough or county cannot be altered by mere executive order (c).

(a) The Statement of Prof. Reinsch at p. 256 of his "Colonial Government" that "the Indian Empire may be regarded under the aspect of a vast federal State" is, I need hardly say, a fanciful analogy.

(b) In Federal Governments, the federated States being in theory independent units cannot submit to their boundaries being altered without their consent even by the Federal legislature. This is so in the case of the Canadian Provinces (British North America Act of 1871, secs. 3 and 6), the Australian Colonies (Commonwealth of Australia Constitution Act of 1900, secs. 111 and 123) and South Africa (South Africa Act, sec. 149)—and yet the members of these federations are not fully sovereign States. The National Congress can determine questions of disputed boundaries under the Argentine Constitution (Art 67) and under that of Mexico (Art 72), whilst in Brazil, it retains a veto on all measures agreed upon between the provinces to alter their boundaries.

Alteration of  
Provincial  
boundaries by  
law outside  
India.

(c) See the Local Government Act of 1888, secs. 53-60, which however authorises the Local Government Board to alter the boundaries of the subordinate county districts and parishes. As to county and borough boundaries, the restrictions of the Local Government Act of 1888 are by no means singular. In several European and American constitutions, the integrity of communal and provincial organisations is expressly secured against executive interference. For instance, that of Denmark by Art 91 provides that the right of the communes to manage their local affairs under the supervision of the State shall be regulated by law; that of Belgium (Art. 31) that exclusively provincial or communal affairs shall be regulated by communal and provincial councils according to principles established by the constitution; that of

40. Each Province is divided into a varying number of Districts which are regarded as the fundamental administrative units, and in all the Provinces, except Madras, a number of Districts constitutes a Division. The Collector is the head of the District and the Commissioner of the Division. Both these circumscriptions were in origin land revenue divisions, and upon the framework furnished by them have been built other jurisdictions, criminal, civil and police, with variations in boundaries suggested by specific administrative requirements. Being mere administrative circumscriptions, it is not surprising to find that the boundaries of Districts may, under Indian Statutes, be varied or altered and new ones created by executive order (a). The position of the Indian District Officer has been likened to that of the French Prefect (b). Beyond the fact that both are official heads of Districts and both are well-paid professional officers, the point of the comparison is not very apparent. Some idea of the variegated relations in which he is brought in the discharge of his public functions may be formed from the following extract from the Report of the Decentralisation Commission (c). He is "the local representative of Government in its general dealings with the people, and is also the District Magistrate. As Collector, he is not merely responsible for the collection of most branches of the revenue, but is concerned with the manifold relations existing between Government and the agricultural classes. Thus he is concerned with questions relating to the registration, alteration, relinquishment or partition of land holdings which pay revenue direct to Government, and, in the greater part of India, has to deal in these respects with an immense number

Districts and Divisions.

Mere administrative circumscriptions.

The District Officer—his powers.

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Holland (Art. 3) that provinces and communes may be united or divided or their boundaries altered only by law. Arts. 82 and 83 of the Spanish constitution seem to assume the integrity of provinces and towns. Art. 74 of the Italian Statuto provides that communal and provincial institutions and their boundaries shall be regulated by law. The Hungarian constitution seems equally jealous of the integrity of its county organisation (Art. 26). The constitutions of Chile (Art. 113 etc.) and Brazil (Art. 68) exhibit special solicitude to assure autonomy to their municipalities whilst that of Portugal guarantees a council to each commune. "Local Patriotism" certainly finds much encouragement outside India.

(a) Baden-Powell, Land Revenue in British India, pp. 21-22.

(b) Ilbert, Government of India, Second Edition, p. 135.

(c) Decentralisation Commission's Report, 1909, pp. 17-18.

of petty peasant proprietors. He is likewise, in most Provinces, concerned with the adjudication of disputes between landlords and tenants and also with the administration of estates taken under the management of the Court of Wards. He has to keep a careful watch over the general circumstances of his District, and in times of famine or severe agricultural distress, he is responsible for the administration of relief and other remedial measures. He also deals with the grant of loans to agriculturists, and with the preparation of agricultural and other statistics, and he has a general control over the working of the Forest Department in his district in so far as this touches on matters affecting the economic or other interests of the people. It is his duty to guide and control the working of the Municipalities, and he is often the actual Chairman or presiding Officer of one or more of these. He usually, also, presides over the District Board which, with the aid of subordinate local boards where such exist, maintains roads, schools and dispensaries, and deals with vaccination and sanitary improvement, in rural areas. Finally, he has to furnish information on all important occurrences in the District and he is called upon to advise on any general schemes affecting it which may be under consideration." Finally, "as District Magistrate he is responsible for all matters affecting the peace of the District, and exercises a general supervision over the local police officers, while he controls the working of subordinate criminal courts, and he has himself a certain amount of original and appellate magisterial work" (a). When it is remembered that "all his most important duties are strictly regulated either by law or by rules laid down by the Government" (b), and that on the other hand he is under no obligation to consult any "Prefectural Council," the analogy with the French Prefect ceases to be applicable. In fact, he never was built on the French model. Originally he was supposed to represent that concentration of all authority, judicial, magisterial and fiscal, which, it was assumed, made the most

Large but to be exercised according to laws and standing orders.

Has no real resemblance to the French Prefect.

(a) Experiments are being made in some districts in Bengal to relieve District Officers of judicial work by appointing Additional District Magistrates to whom exclusively is assigned the trial of criminal cases.

(b) Strachey, India: Its Administration and Progress. Third Edition, p. 361.

successful administrator in the Moghul regime. But English public law has "regulated" him out of recognition, and he is more like a magnified English Justice of the Peace as he was in the beginning of the 19th century than the French Prefect of the same period. The present demand for decentralisation would have been pointless had he been, aside from being an official, at all like the French Prefect. The recommendations of the Decentralisation Commission, if accepted, would have made the resemblance to the French Prefect not as he is, but as he was in 1800 A.D., somewhat nearer.

41. Each District is usually split up into a number of Subdivisions which are in charge either of junior officers of the Indian Civil Service or of officers of the "Provincial" Service. The functions of these Subdivisional Officers, who are Magistrates as well as revenue and executive functionaries, vary in different Provinces. They are most developed in Madras and Bombay, where the Sub-Divisional Officer exercises within his own charge most of the functions of a Collector, subject to supervision by an appeal to the latter (a).

Sub-Divisions.

42. Save in Bengal and Bihar and Orissa, there are smaller sub-district units, styled Taluks or Tahsils, administered by Tahsildars who belong to the "Subordinate" service. These officials are, in general, under the immediate control of the Sub-Divisional Officer where there is one and they and their assistants (deputy or naib tahsildars, revenue inspectors, kanangoes etc.) are in direct relations with the cultivators and the village officials (b). They too exercise in varying proportions both revenue and magisterial functions (c).

Taluks and Tahsils.

43. The Divisional Commissionership when first created (1829-33) was intended to fill in the Division the same, if not a more important place than, the Collector-Magistrate does in his District. But owing to a combination of circumstances, his powers have suffered serious diminution, though it may be (as the Report of the Decentralisation Commission holds) an exaggeration to say that he has been reduced to the position merely of a channel of communication between the District Officer and the Government. He does exercise

The Divisional Commissioner.

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(a) Decentralisation Commission's Report, p. 18.

(b) *Ibid*, p. 18.

(c) *Ibid*, p. 207.

His functions  
as a vetoing  
authority.

Discretionary  
powers regu-  
lated by  
rules and  
standing  
orders.

Municipali-  
ties and  
Rural Boards.

a large amount of supervision and control over the revenue administration, and should the recommendations of the Decentralisation Commission be carried into effect, he will be able to exercise a kind of suspensive veto over the acts of the District Officers and others serving in the locality under specialised departments. The creation of specialised departments controlled directly from the Provincial head-quarters is stated by the Commission to be one of the causes which in recent decades have reduced the powers of the Commissioners and Collectors. But the principal factor which has operated to limit the extensive prefectorial authority of these officers (as also indeed that of the District Officers) is the peculiarly English habit transplanted into India of "codifying into acts, rules or standing orders matters which in old times had been left to the discretion of individual officers" (a).

44. Of recent years, the foundations have been laid in India of two new administrative units for local government purposes built on European models, viz: the Municipalities and the Rural Boards. The former naturally have a more advanced representative organisation than the latter and whilst virtually (b) every District has a right to be

Small finan-  
cial resources  
of Collectors  
and Commis-  
sioners.

(a) *Ibid*, Chs. XII & XIII Though the discretionary authority left to the Commissioners and District Officers may, inspite of these restrictions, be extensive, their essentially subordinate character and the artificial nature of their local jurisdictions are conclusively demonstrated by their extremely restricted financial freedom. They have, of course, no local taxing power—that belongs to the Municipal and Rural boards and exists for the special purposes of these boards. The following extract from the Decentralisation Commission's Report, p. 179, may be left to speak for itself. "In Bengal, of late years, the Commissioners have been given allotments of about Rs. 10,000, per annum from which they can make grants at their discretion, direct or through Collectors, for purposes of a public nature, or to remedy small defects brought to their notice in the course of their tours. Grants of this sort can be applied to giving some special assistance to deserving local objects. The late Lieutenant Governor of Bengal.....points out that the position of district officers in financial matters is at present anomalous, their powers being exceedingly small in comparison with their functions and responsibilities." The Commission recommends that the funds given to the Commissioners for these purposes should be "large enough to enable them to distribute funds of this character to their Collectors, and to keep in their own hand a reserve for direct outlay by themselves and that these grants should not be subject to detailed audit."

(b) In Burmah and Baluchistan, at the date of the Decentralisation Commission's Report, there were no Rural Boards and Assam was the only

incorporated into a Rural Board (for experimental purposes at least), the conferment of municipal rights on towns (outside the three Presidency cities) is in the gift of the Local Governments, subject to their fulfilling certain requirements as to population which must be shown to be in large proportions non-agricultural. Every Municipal Act (other than those governing the Presidency cities) provides for contingencies in which the powers and properties of the Municipality may be taken over by Government and exercised by it directly through its own agents. The city governments of the three Presidency towns only may not be extinguished in this fashion, but these equally with the others are subject to varying degrees of outside control on the part of the Local Government resembling those possessed by the Local Government Board in England over Rural (not Municipal) boards. But outside the Presidency towns, the Municipalities are, according to commonly accepted opinion, "constantly kept in financial leading strings" and in effect exercise very little independent authority. Of the Rural Boards, the Decentralisation Commission's Report, at p. 269, endorses the familiar criticism that they have "practically become a department of Government administration; their work is done by the official element within the boards themselves or by the Government departments at the Board's expense. Their proceedings are subjected to excessive outside control". The Commission appear also to endorse the charge that the rural boards are starved in the matter of resources.

Very much  
State-regu-  
lated.

45. Besides the Municipal and Rural Boards, there are, in the United Provinces, Bombay, the Punjab and Burma, "notified areas" i. e., towns which are not fit for full municipal institutions, to which only portions of the Municipal Acts are applied and whose affairs are administered by nominated Committees.

46. From the above account it appears that the Indian local organisation as a whole is qualitatively inferior to that

A compara-  
tive estimate  
of Indian  
local organi-  
sation.

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Province where the scheme of an independent board for an area smaller than a District had been tried and there were no District Councils to settle matters of common interest. In all other Provinces, the system adopted was that of controlling District Boards with Subordinate Sub-district Boards. In Madras and Bengal, the revenue sub-division was chosen as the jurisdictional unit for these Boards, whilst in other Provinces the unit was the Taluka or Tahsil. See Decentralisation Commission's Report, p. 247.

of England on the one hand and of France and Germany on the other. The Indian local authorities are neither decentralised (a) as in England and Prussia, nor deconcentrated as in France and Prussia. They are numerous and superficially exhibit a remarkable resemblance to the local authorities of Continental Europe. But they appear to exist only to perform the routine business of Government in the routine way. For anything lying outside, each authority appears to exist only for the purpose of vetoing the others. The result is absence of local initiative, and, unless the impulse comes from above and in a sufficiently strong current to overcome local inertia, stagnation. An institution here and there may for a time be galvanised into life by personal initiative working against the system, but not owing to it. To compare the Indian District organisation with the Prefectural organisation of France appears to me to be singularly inappropriate.

47. There seems, however, to be a growing determination to solve the problem of Indian local administration by reviving the ancient village organisation, under official auspices, so that what natural local life and patriotism there still may be in the villages may be enlisted in its favour. It is also proposed to infuse new life into the existing rural institutions by endowing them with larger responsibilities, financial and otherwise, and making more real the element of popular control now existing only in name. We are evidently on the threshold of very large experiments in rebuilding the local administration of India (b). A thorough reconstruction undertaken in a spirit almost of bold adventure, such as we know had accompanied the launching of the Prussian scheme of local self-government, is needed to pull the local administration of India out of the rut of official listlessness into which it has apparently fallen.

A forecaste.

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(a) I must point out that in Indian official literature and in the Report of the Decentralisation Commission itself, the word "decentralisation" is almost invariably used to mean "deconcentration" It would be convenient to confine the use of the word to imply the exercise of public administrative functions by non-official honorary agencies only.

(b) See *infra* Lecture XX, paras. 48-59.

## LECTURE VIII.

### LOCAL AUTHORITIES IN RELATION TO CENTRAL CONTROL (a).

1. From the above survey of typical forms of local organisation, I sought, by an effort of abstraction, to keep out as far as was possible, all references to the central organisation and central control. But this was only for convenience of presentation, and I am not sorry, as I look over the previous pages, to find that this element refused to be suppressed and persisted in showing itself at every turn. It does not certainly promote one's appreciation of an institution if the most important part of it is always kept in the back ground. In Unitary Governments, central control and local government form parts of one organism. One may proceed to study its structure from the base upward or the process may be reversed. But it would be wise perhaps to combine both procedures. At any rate, that is the plan I am going to follow in regard to the present topic. In the last lecture I followed the first mentioned process, and that led me to discover that there are two types of central control exercised over local authorities—one predominantly legislative and the other predominantly administrative—both being combined in fairly even proportions in India. I shall now proceed to study that control from upwards.

Local administration and central control.

Two types of control.

2. But, before I do that, I have to point out that central control may extend beyond the boundaries of a Unitary State, the local organisation within which only formed the subject of my enquiry in the previous lecture. There may be States possessing colonies more or less loosely bound with the central organisation, and there may be a central federal organisation imposed on a number of Unitary States. This inquiry from the top will therefore necessarily spread over a much wider field than the inquiry in the reverse direction which I have just concluded.

Central control may extend beyond the limits of the Unitary State.

3. I must also make myself clear as to another matter which repeatedly came into evidence in the course of that en-

Matters of "central" and "local" interest, what are.

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(a) For convenience of presentation, the discussion in the present lecture will be confined mainly to self-governing local bodies.



quiry. I had more than once to refer to what is spoken of as business of central interest as distinguished from business of local interest. Are these really as clearly and inherently separated as this distinction seems to imply? What, in other words, are the matters which by universal assent may be labelled "local" and what "central"?

No hard and fast line of distinction between them.

Origin of local governments—Degrees & measures of devolution & motives conditioning them.

4. The inquiry into which I am about to enter will, I hope, demonstrate that there is no universally accepted method of distributing local and central functions. The distribution should in each case be dictated by considerations of sound policy and practical convenience combined. In point of fact, however, until less than a hundred years ago, the Central Government in no country appears to have normally thought of establishing autonomous local authorities and endowing them with any part of its powers, unless driven thereto by necessity or otherwise than as a matter of individual bargaining. Its adoption as a principle of good government is a very recent acquisition of political science. The lesson moreover has as yet been so ill-learned that it is a common occurrence to find the same government simultaneously accepting and rejecting it for different local areas. Even when the principle has been accepted, the devolution of authority has been circumspect or otherwise according to the degree of nervousness felt by the central authority over its acts of renunciation. To put it in the form of a paradox, the widest powers of self-government are often enjoyed by those local units in whose favour there has been no devolution of authority—in other words where independent local units have come together and established a central federal government. In these cases the grant of authority has really been to the Central Government by the local units and is in consequence quite liberal to the grantors. So much for the *motives* which determine the devolution of local authority and the manner of its distribution as conditioned thereby.

Instances of largest devolution of internal authority.

5. I shall start with instances of the largest delegation of internal authority by the central to local authorities. It is quite possible to conceive of an arrangement under which all authority in any way affecting a particular locality is delegated without reserve to the local authority, the central government retaining control only over those interests which

may affect that locality and others equally and which may appear not to admit of division and distribution amongst circumscribed local units. The powers possessed by the Self-governing colonies within the British Empire are perhaps as near an approximation to this condition as is conceivable. The delegation of authority to these colonies is "feudal" in character, using that term in the somewhat wide sense which in previous lectures I have assigned to it. Like all feudal delegations, they have been made only because a more restricted delegation has been rendered impossible by circumstances. Students of English colonial history are aware that the impracticability of governing far away settlements, carrying with them in their new *habitat* the habits and free institutions of the Mother Country against the wishes of their inhabitants, directly from a bureau located in London was not borne home to English politicians even by the loss of the American colonies, and, for more than half a century following this event, the attempt to govern the colonies from London was persisted in with what appears to the more enlightened opinion of the present day to be perverse obstinacy. That opinion, however, it is of importance to note, is of quite recent origin and had its inception in the celebrated Canadian despatch of Lord Durham. As to whether, without that despatch, the new departure in English colonial policy would have been made at all, it is unnecessary to speculate at this date. Personally, I think it was part of a more general movement affecting opinion in the domestic as well as in the foreign and colonial politics of Great Britain. But the value of the despatch, as an instrument of political education, on the policy of granting self-governing institutions wherever the circumstances seem to justify it, is unquestionable.

Self-governing colonies of the British Empire.

Lord Durham's Despatch—as an instrument of political education.

6. But one may easily exaggerate the extent to which this education has made progress in the field of British politics. It has hardly made any outside it. That the desire to maintain central control wherever it is possible to maintain it is still very strong within the British Empire is illustrated by the fact that whilst complete self-government was granted to distant South Africa within a decade of the Boer rebellion, the expediency of granting a smaller measure of autonomy to Ireland is still being vigorously debated; and until very recently the idea of granting self-governing institutions to

Lessons of the Despatch ill-learned & ill-applied.

divided India was regarded as being as much outside the pale of practical politics as the grant of similar institutions to the most backward of British Crown colonies.

Self-government the goal of local administration.

Material obstacles to its attainment.

The federal movement one in the contrary direction.

7. Before leaving this topic concerning the policy of granting autonomous organisations to local divisions within the British Empire it is desirable to note the necessary limitations by which such grants must often be circumscribed in the interest of good government. Grants of *complete* self-government are, as I have said, feudal in character and carry with them the inherent weaknesses of all feudal delegations. It is now fully recognised that the forces which at this moment bind the Self-governing British colonies to the Mother Country are those of sentiment and self-interest only. It may be safe to assume that no Government would have permitted the allegiance of its territorial units to hang on such slender threads, if stronger bonds, acceptable to the colonies and enforceable by the Central Government, could possibly have been devised. It certainly does not promote good government, at any rate for compact territorial units in close geographical association, to have complete autonomy in all matters, and it is instructive to note that the progress of self-government in the British colonies has synchronised with a movement in favour of federation amongst geographically compact areas. Such federation can of course be attained only by a substantial sacrifice of local autonomy; and not only colonies but even independent States which happen to be geographically connected, beginning mainly as associations for purposes of common defence, have, from considerations of sound administration, been carried step by step towards true federal unions, involving important restrictions on their local autonomy. The close neighbourhood of Ireland to England itself places important limitations on her demands for self-government, the soundness of which is admitted by her most advanced patriots. Other conditions, besides those of neighbourhood, may impose other limitations. The expediency and extent of any grant of local autonomy to distant dependencies must in every case be determined by the peculiar conditions of the country operating to modify in its application the principle otherwise unquestionable that the highest form of government and the ultimate goal of all governments is self-government.

8. Putting aside cases of federations (and the British Colonial Empire is really an inchoate federation of States (a) possessing varying degrees of internal sovereignty), and turning now to what may be seen within the limits of Unitary States, the tendency until recently was indubitably towards over-centralisation wherever the Central Government had succeeded in attaining a position of pre-eminence over the other elements of the State. That it was necessary in Western Europe for the purpose of counteracting the disruptive particularism of fiefs and cities is one of the accepted facts of history. It was certainly less thorough in its operation outside Western Europe, where (as in Sweden and Mussalman India) it failed to reach and absorb the village communities, but the highest limits of centralisation were reached in those countries where the monarchy developed a strong-willed, scientific and conscientious bureaucracy as the instrument of its will. This happened in Rome under the Emperors and in post-Medieval France. The natural tendency of all Unitary Governments in the past appears from history to have been to reduce all self-governing associations into unrelated individuals except in so far as they might serve the purposes of the State. The Roman Government tolerated the city governments only because and in so far as they guaranteed the security of the taxes. In Medieval Europe, towns were tolerated as self-governing units because they refused to submit on any other term. No city charter was ever a free gift from the lord. It meant a compromise, preceded always by a struggle, or at best a method of raising revenue. As it was, the charters proved but weak barriers against the waxing powers of the monarchy.

In Unitary States, tendency until recently towards centralisation.

The instrument of centralisation—an organised bureaucracy.

9. The form of government in which a State whose primary object is "to hold the country" (b) naturally embodies itself is a hierarchically ordered bureaucracy. Administrative control of the lower by higher officials leading ultimately up to the highest executive is sufficient to impart coherence to

The bureaucracy of Continental Europe.

(a) A variety of schemes of real federation is being discussed at this moment. Mr. Lionel Curtis's "Problem of Commonwealth" puts the case for it with marked cogency and ability.

(b) I have to express my obligation for this phrase to Sir C. P. Lucas, *vide* his "Greater Rome and Greater Britain" (1912), pp. 59-60.

the organisation. Bureaucracy emphatically repels lay interference in public affairs. It seeks to retain the issue of administrative ordinances in its own hand and does not suffer political and public acts of officials to be examined by ordinary courts of law according to prevailing notions of justice and fair dealing—and “reasons of State” are with it matters of paramount importance before which every other consideration moral or material must be made to give way. This form of government made great progress on the Continent of Europe where monarchy finally triumphed over the “estates.”

The decentralised “Squirearchy” of England.

The Justices of the Peace.

Organs of central control, Parliament & Royal Courts.

Bureaucracy eliminated.

10. In England alone bureaucracy failed to develop on normal lines. There the representatives of the boroughs and counties, whom the King called together for “advice and counsel,” never let go their hold on supply and used it to such good purpose that, in the reign of Edward III, the King had, at the instance of the Commons, virtually to abolish bureaucracy by replacing his professional officials, the Sheriffs, by unpaid Justices of the Peace appointed locally to carry on the administration of the counties. The Justices of the Peace had to be appointed from the local gentry, the very class to which the Commons belonged and who alone could serve without compensation. Bureaucracy no doubt was replaced by “squirearchy,” but the administration was completely decentralised. The two organs of central control which remained to operate in the localities were, first, the Royal courts and, secondly, the King in Parliament. Administrative control over the Justices of the Peace continued in theory to reside in the Privy Council and was to become active for a time on the only occasion in English history when bureaucracy in the Continental sense made any progress (a). But the Justices of the Peace, unlike the Sheriffs, were officers created by statute (34 Ed. III c. 1.) and the normal (and practically exclusive) method of controlling them came to be through Parliamentary statutes which it was left to the Royal courts

(a) See Redlich & Hirst, *Local Government in England*, Vol. I, p. 20. The Tudor Kings created new centrally controlled provincial authorities in the Councils and Courts of the North, Marches of Wales and Lancaster and the Court of Exchequer of the County Palatine of Chester. It was of course the Court of the Star Chamber which exercised the greatest influence on the provincial administration of this period. All these bureaucratic out-growths fell during the Great Rebellion (1640).

to enforce on the complaint of aggrieved persons. This (from the Continental point of view) unusual method of controlling the administration was further emphasised later on when the Court of Star Chamber was abolished in 1640 (16 Carol I. c. 10) and exclusive jurisdiction of the Court of King's Bench was substituted for that of the Privy Council (c). Thus whether from accident or design or from both combined bureaucracy was completely eliminated from England.

11. I have previously explained how what is called the "Industrial Revolution" brought into existence administrative problems with which the old machinery controlled indirectly by the legislature and law courts failed to cope, and the necessity of establishing some form of central control was driven home into the minds of the members of the reformed House of Commons in 1834 by the report of the Poor Law Commissioners of that year. The deficiency has since been supplied but without establishing a bureaucracy and without materially departing from the normal mode of regulating the working of public authorities by legislation. This, however, it has been possible to accomplish only by recreating a new organ which, highly unwelcome to Government in its earlier days, it has now become its settled policy to establish and foster. It is a policy which to-day is by no means the exclusive policy of the British Government, nor is it confined to the sphere of local self-government. There is a growing belief in the value of genuine self-government through representative councils as an instrument of good government in the sphere as well of colonial and local as of central government. The conversion of modern governments to this new creed can hardly yet be said to be complete in all three spheres and progress towards it in some governments has been slower than in others. But in the sphere of local government proper at any rate there seems to be no reason for doubting that it is as thorough as it is universal.

Necessity of central administrative control felt after the Industrial Revolution.

The control created not bureaucratic, is consistent with local self-government.

12. It is not easy to determine all the causes that have contributed to the dissemination of this new creed. The prime factor has no doubt been the growth of democracy. It was but natural that the power which obtained control over the central government should not like to leave the government in the localities in the hands of the privileged classes whom it had displaced at the centre. This factor

Origin of local self-government. Growth of democracy as a determining cause.

however operated in different degrees and with unequal celerity in different countries and in some was wholly forestalled by others. In France, the establishment of communal self-government formed one of the cardinal principles of the Revolution of 1789. In England, it took something like half a century for democracy to translate itself into representative institutions in the counties, though owing to circumstances of an emergent character it came more quickly into the boroughs. In Germany, the grant of local self-government to towns and communes has preceded the advent of democracy in the central government.

Failure of  
bureaucracy  
the cause of  
the introduc-  
tion of local  
self-govern-  
ment on the  
Continent.

In France,

In Germany.

13. In every country outside England, it was the demonstrated failure of bureaucracy unassociated with popular control to govern the country in the interest of the nation that pointed to local self-government as the true solution of the problem of local government. In France, it was the shameful neglect of the interest of the common people in towns and communes by the agents of Government and the selfish exploitation of the resources of the localities to bolster up the extravagance of the Court and the nobility which brought on the Revolution. In Germany, State after State fell before the march of Napoleons's democratic army, and even the military power of Prussia built up by the life-long devotion of generations of Kings crumbled before it. Not a single private German subject started up to stop the invaders. The fact is that in a thoroughly bureaucratised State the work of Government is so completely monopolised by the officials and so thoroughly are the interests of the ruled separated from those of the ruling body, that the former cease to take any interest in the affairs of the Government, and no misfortune however great which may overtake the Government suffices to rouse the patriotic instincts of the people to its support. German nationalism was not the creation of German bureaucracy. It was provoked and called into life by the arrogance of Napoleon. But German officialism, be it said to its credit, knew how to use it when it came. After the debacle of Jena and Auerstadt, Prussian statesmen set themselves deliberately to enlist the sympathies of the people in the business of government and self-government in towns and communes found a prominent place in their programme of reform as one of the means by which that end might be attained.

14. If local self-government suggested itself to the reformers on the Continent of Europe as an antidote to bureaucracy, England was led to it by the fear that bureaucracy of the Continental type might be coming if she was not somehow redeemed from that condition of disorganisation and drift into which she had fallen owing to the system of decentralised squirearchy which had governed her since the time of the Plantagenets but which, in the 18th and 19th centuries, failed to take account of, still less to lead, that "Industrial Revolution" by which the very appearance of the country was altered out of recognition.

Fear of bureaucracy coming the cause in England.

15. The Report of the Royal Commission appointed by the reformed Parliament of 1832 to enquire into the administration of the Poor law disclosed grave abuses which on the one hand was degrading and demoralising the working classes at the same time that it brought the well-to-do classes to the verge of bankruptcy. These results were conclusively shown as being directly attributable to the ignorance and incompetence of the Justices of the Peace. Any other nation than the English would have, in similar situations, struck at the root of the entire institution of the Justices of the Peace. But with characteristic conservatism the English Parliament proceeded to reform the Poor law administration only. The Report of the Commissioners had clearly demonstrated the necessity of establishing a controlling executive authority at the centre to guide the local authorities, and, if necessary, to keep them up to the mark by compulsion. Such an authority was so foreign to English ideas and had such a Continental appearance about it that people could be persuaded to accept it only on condition that the local authority itself was converted into a locally elected representative council and the control of the central authority made to savour as little as possible of Continental administration by being made largely "outside" and "indirect." The Justices of the Peace were not abolished but were made ex-officio guardians along with those elected and thus placed in a minority (a).

Abuse of the Poor law administration demonstrates need of central control.

Central control how qualified.

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(a) It will perhaps be not out of place here to mention that the principles embodied in the Act of 1834 were derived mainly from Bentham's Constitutional Code. Artificial circumscriptions formed without regard for history or tradition and mainly determined by the immediate requirements of the object to be served, local authorities elected by the inhabitant ratepayers and



Poor law administration now more centralised than any other branch of local government.

16. Nevertheless the powers conferred on the central authority by the Poor Law Act of 1834 are larger than have ever been delegated by Parliament to any executive authority exercising power within the British Isles either before or since. The central authority can and do under the Act of 1834 pass general orders binding on the Local Unions and can also issue special orders short only of giving relief in particular cases. It sends out inspectors who not only visit work-houses but attend and speak at the sittings of the guardians. The central authority prescribes the qualifications, duties and salaries of the paid officers of the local boards and these though appointed by the guardians may be removed by the central authority and cannot be dismissed without its consent. There are other more indirect ways of exercising supervision over the local Poor law authorities to be mentioned hereafter. But those specified above suffice to show how near a bureau in the Continental sense the central board had come to be.

The Municipal Corporation Act on the other hand reduces central control to a minimum.

17. In 1835, the Report of another Commission appointed to enquire into the administration of the boroughs revealed a state of things only less deplorable than that disclosed by the Report of the Poor Law Commission. The Municipal Corporation Act of 1835 reorganised the borough corporations on a thoroughly democratic basis. An elected Municipal Council and paid executive officials working under the direction of the former are features of the borough government established by the Act, as they were of the Poor law organisation created by the Poor Law Act of 1834. But in two important particulars this Act refused to follow the precedent of the Poor Law Act. The new Act did not provide for a central controlling agency. It seemed as if Parliament was anxious to recant that particularly obnoxious form of political heresy.

Public Health Act favours centralisation.

18. The panic caused by the cholera epidemics of 1847 and 1848 gave a fresh impetus to the movement in favour of inaugurating a strong controlling body in the Central Government. But the powers which the Public Health Act of 1848 gave to the General Board of Health were nothing near as

drastic as those conferred on the Poor Law Commissioners. The General Board of Health could pass general and special orders only with reference to particular subjects specified in the statute. The Inspectors did not participate in the councils of the local authorities. Parliament subsequently created other central boards to control the action of other local authorities created for other local government purposes, but none of them has been endowed with the powers of the Poor Law Commissioners. The control which they were authorised to exercise was indirect outside control. Taking the Local Government Board as the type, its control operates in the following ways, *viz*, (i) a limited power of making regulations, (ii) a similarly limited power of issuing orders, (iii) power to audit accounts of all authorities (other than boroughs), (iv) inspection, (v) power to demand returns, (vi) the requirement that its consent should be taken in respect of a variety of local undertakings, and (vii) grants-in-aid which imply that the local authorities should satisfy the requirements of the central board as a condition for their renewal. The central authorities in England, it is claimed, act more by pursuasion and advice than by commands.

Other central boards have less control over local bodies.

Control, how exercised.

19. But it would be a mistake to imagine that because the English Parliament prefers to carry on local government through popularly elected bodies rather than by paid official agents, that being in its view the only means of keeping the inroads of officialism in check, that therefore it also favours local autonomy. The deficiency in the matter of administrative control is more than made good by statutory regulations going into the minutest details. Recently the increase in volume of its legislative work has led Parliament to frame such statutes with less amplitude of details, and Ministers have in such cases been authorised to fill up the gaps so left by administrative ordinances and orders. Whenever this has been the case, the executive from sheer national habit have proceeded to make good the omission with truly Parliamentary minuteness. The local authorities in England have thus to work "cribbed, cabinèd and confined" within a variety of laws, rules and standing orders. Municipal administration in England, and still more in America (a), is, it is therefore

Local bodies have little autonomy being minutely regulated by statutes and standing orders.

(a) It is unnecessary to deal with American local organisation with reference to the question of central control for the simple reason that no

alleged, so much more backward than it is on the Continent of Europe because of the many unnecessary limitations imposed on their free action by statutes and standing orders.

Local autonomy on the Continent through absence of legislative interference.

Administrative control formerly excessive.

Recent changes favouring decentralisation.

Origin of local self-government in India.

20. On the Continent of Europe, as I have already stated, it is not the practice for the Legislature to lay down minute regulations for the guidance of the authorities whether in the central or in the local governments. Local authorities when constituted receive by the very Act of their constitution whatever powers of government are left after subtracting therefrom matters regarded as of central interest. Their competence within the sphere of local government is unlimited, but it is subject to direct administrative control by the higher authorities. This interference, less than half a century ago, was in both France and Germany so excessive as almost to reduce the local bodies (very much like what has happened in India) to the position of agents to carry out the wishes and policies of the central government. Profiting however by English example, the Government of Prussia in the seventies of the last century and that of France about the same time made the local authorities, in matters which are regarded as of local interest only, as independent of central administrative control almost as are the local authorities in England, for neither the Prefect in France, nor the Governors of Provinces in Prussia are now members of the local executive committees. They exercise, in the main, outside supervision and control and local government in those countries is thus as much decentralised to-day as in England. It is on the other hand more autonomous than in England and America, not being hampered as in the latter country by minute statutory and administrative regulations.

21. It is not merely imitation or admiration of European institutions which has led the Government of India to formulate its scheme of local self-government in the Districts and Municipalities, already alluded to in the previous lecture. From Lord Ripon's Resolution on Local Self-Government of 1882 the motives which led to its introduction may be

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control of any sort other than the legislative has yet been devised in that country. American local government is thus more decentralised than the English and proportionately more harassed by legislative interference. See Lecture XX *infra*.

gathered to have been (i) to relieve Government of the duty of attending to matters of purely local interest—a duty which the increasing demands upon it in regard to matters of general interest made it impossible for it to fulfil with efficiency or even with proper knowledge of local needs—to the consequent detriment and neglect of local interests, (ii) to enlist local intelligence and local knowledge in local service and to create local interest in such service, by handing over the responsibility for its performance to more or less representative local councils thus indirectly affording an opportunity of political education to the people of India—a desideratum expressly formulated in the Resolution. The fact that much of this work of local supervision was to be honorary was also not without its attraction to a Government which is often charged with being more expensive than the circumstances of the country fairly permit. The experiment, it is generally believed, has not had a fair trial and we are probably about to enter upon an era of vigorous local self-government in rural areas, based on the natural Indian local unit of the village. The system as it stands suffers from the defects of both the English and Continental systems. The local bodies in India are on the one hand more minutely regulated by statutes and standing orders than are their English prototypes. They are on the other hand more completely under “official leading string” than are French and German local bodies. They suffer moreover from the additional drawback of inadequacy of resources. Everywhere in India local service is starved in the interest of general service.

Its present  
defects.

22. I have now concluded my survey of local organisation in its smaller circumscriptions from both the points of view mentioned at the opening of this lecture, viz: from the bottom upwards (as I had done in the previous lecture) and again from the top. That survey however will not be complete without some further observations of a general character suggested by the materials passed under review.

23. First, if ‘local patriotism’ is to be effectively enlisted in favour of local government, and if local administration is to be broad-based and not confined as in the old English counties to a self-interested ‘squirearchy,’ the jurisdiction of the local units should (in the language of Lord Ripon’s

What should  
be local self-  
government  
units.

Resolution) be "so limited in area as to ensure both local knowledge and local interest on the part of the members". But the smaller the area, the narrower the functions the local bodies will be asked to discharge, for matters affecting several neighbouring local areas in common will have to be excluded from the scope of each of these bodies. The matters thus excluded may yet be matters of not sufficient general interest to be taken up by the Central Government. It is accordingly usual to find larger local circumscriptions, which too according to principles herein-before enunciated, must be handed over to elected councils. But where is this operation to stop? The answer to this, as to most political questions, is to be found not in theory but in experience. In all countries, towns generally admit of being treated for local government purposes as self-contained units, but in rural areas it is usual to find two and sometimes three concentric self-governing areas one within the other. In England there are Parishes, Districts and Counties for local government purposes. In India we have Local and District Boards; on the Continent of Europe *e.g.* in France, Communes and Departments, and in Prussia, Communes, Circles and Provinces, and in the Netherlands Countries, Communes and Provinces. There is a real danger in confining local patriotism within very narrow limits. People of every locality must be taught to entertain wider outlooks and to take interest not merely in the affairs of the small local areas of these towns and villages, or even of their districts, but in those of their country as a whole. A County or a Department may suffice as the largest local government unit in England and France. But wider areas have to be taken into account in countries spread over larger territories. In India, as already stated, a larger area than a District (*e.g.* Division) has been created in every Province other than Madras for central government purposes. Whether these should be constituted into units for local Government purposes must depend, I say again, not on abstract theoretical but practical considerations. Prussia has a provincial local organisation above the County, but this may be the outcome more of tradition than of administrative necessity. One thing however seems clear. In order that local patriotism may not degenerate into narrow parochialism, people of all localities must be enabled to participate in the administration of the country as a whole.

Towns.

Concentric  
local bodies  
in rural areas.

Danger of  
confining  
the interest  
of the people  
entirely to  
local affairs.

Need for or-  
ganising lar-  
ger local self-  
government  
units.

To put the matter in the form of a paradox, the Central Government itself must be communalised. Small local councils controlling purely local services may be good enough, but to be really beneficial, they must be capped by a fully representative central legislature, a legislature which every person in every locality must feel he has helped in returning, and one which must possess sufficient control over the central executive to enable the people of all localities to feel that the Government is theirs. If national patriotism is an asset of any value to a Government the way to it lies in making the Central Government itself national. A Government remaining and operating *ab extra* and not drawing its life and purposes from the people, however benevolent and farseeing it may be, cannot hope to enlist the latter's patriotism in its favour. At moments of trial, its appeals to the people will often meet with inadequate response. Small local units created for local government purposes and not taught to look higher may even prove the worst agents of obstruction to the aims and purposes of the Central Government.

Need for communalising the central administration.

24. Secondly, with reference to the motives which have led modern governments to substitute, in the place of direct official control, the control of elected representative bodies (a), it is necessary to say that no institution is redeemed only by the excellence of the motives which lead to its creation. All representative institutions have to justify themselves by results. These again must depend on their *personnel*. Whether representative councils should prove good or bad substitutes for the officials they displace, depends therefore ultimately on what kind of men are elected on these bodies. The election laws thus constitute the life-blood of these bodies. A government which has made up its mind to give its subjects self-governing institutions on trial may make or mar their future by the election laws which are to determine the *personnel* of the self-governing bodies. Where, as in England, the population is homogeneous in sentiment as well as in interest, direct election based on numbers perhaps suffices (b). Whether

Importance of securing good men to serve on local bodies.

Election laws.

(a) And this applies to local as well as to central legislatures.

(b) The assumed homogeneity in sentiment and interest of the population of England is however disputed. See Orage, "Guild Socialism" and Wallas, "The Great Society", and the commentary thereon in Ch. VIII of Barker's

the electors and candidates should possess property, residence or other qualifications may also require consideration. Where the electorate is divided into conflicting classes and interests, it may be a question whether representation should be given to separate interests or whether for the sake of unity of counsel such conflicts should on the whole be ignored. Different governments have sought to solve these questions in different ways, depending as often upon prejudice as upon considerations of sound policy. Besides, the whole matter is still so wholly in the experimental stage, that no general conclusions of any value are likely to follow from a tabulation of the various methods of election prevalent in different countries. In recent years, a vast amount of literature has accumulated bearing on the questions of the relative merits of direct and indirect election, of the propriety of permitting representation of minorities and proportional representation, of voting on single and general tickets, of plural, limited and cumulative voting, of manhood and woman suffrage, of what should be the limits of an ideal election district, and of the periods for re-election. They raise problems upon which as yet no general agreement has been reached. In the absence of reliable conclusions of a general nature, a comparative study of election laws will certainly not be promoted by merely registering such facts as that woman suffrage has been established by law in Norway and New Zealand, that proportional representation of a very complicated character adopted by the law of Belgium has or has not produced the expected consequences, that the three class system of representation of Prussia which is reprobated in Anglo-Saxon countries seems to serve the present requirements of that country well enough, that manhood suffrage exists in France and has made greater progress in some of the English Colonies than in the Mother Country, that that country has not yet made up its mind on the question of plural voting, that France's allegiance to the principle of manhood suffrage is modified in its application in some of her colonies to quite the same extent as it is modified in Prussia by the application of the three-class system of indirect election, and that from being representatives of the

whole country and free agents, the persons returned to representative councils are tending to become the mandatories of the electors who have returned them, at any rate in England and the United States (a).

(a) For an up-to-date treatment of the whole subject within a limited compass, see Garner's *Introduction to Political Science*, Ch. XIV. I am the less disposed to generalise on this subject because looking at the electioneering process as it is practised in England and America, as an outsider, I cannot help feeling that it has largely become at its best a matter of "hypnotising the electorate by every manner of suggestion," and at its worst, a matter "of its manipulation by greater interests for their own ends". I have no doubt that government by party 'caucus'es is better than government by a full-blooded bureaucracy, except where the former are organised (as they appear to be to-day in the American States and as they certainly were in Portugal before the Republican revolution) for purposes of "spoils". But if democracy has no better means to offer for its fulfilment than caucuses, it will, I apprehend, not be long before it ceases to be an inspiring ideal. (See Bryce, *American Commonwealth*, Ch. LIV, and Ogg's *Governments of Europe*, Portugal, para. 699.

Government  
by party  
caucuses.

Certain inferences, however, of a negative character drawn from the experiences of French colonial administration by Mr. Reinsch in his "Colonial Government" may be of interest to Indian students, the only ones I have found bearing on the question of representation of a White ruling minority living in the midst of a large Coloured population. These are: (i) Where, as is the case in some of the French colonies, a minority of Whites (who of course have come to the colony only to seek wealth and make their fortune as quickly as possible) has secured predominance in the local council, representative institutions have been invariably made the instruments of shameless abuse. In Cochin China, for instance, "taxes gathered from the entire colony were lavishly spent upon the adornment and improvement of Saigon, the French town of residence, appropriations made for a botanical garden were diverted and used for city parks, and road building in the interior of the colony remained undone in order that splendid drives round the capital might be constructed. Officials who showed an inclination to interpose objections to this policy of the council had either their salaries raised to silence them, or, if too intractable, found that their recall had been successfully requested of the home authorities. Meanwhile, the resources of the colony lay without development and the native population lived in 'increasing poverty'". (ii) Where, on the other hand, the Coloured majority has been given anything like adequate representation, the industrial and commercial development of the colony is said to be endangered by unfavourable legislative activity. Mr. Reinsch thinks that for such colonies a return to absolute government under the English Crown colony system would be better than a representative system in which there is a decided White or Coloured majority, but for the fact of its prohibitive costliness and the dislike with which this form of government is viewed by White and Coloured people alike. He notes, however, that when the White colonists have to choose between it and a system of representation which would put power in the hands of the natives

Evils of a  
badly constructed  
electorate illustrated.



Nature and extent of devolution as determined by area.

Special claim of town-populations.

Effect of distance.

Effect of policy.

Resulting definition of "local" and "central" interests.

An ideal classification.

25. Thirdly, as to the distribution of functions between central and local authorities, I pointed out, at the outset, the difficulty of generalising on this matter. The survey I have just concluded must have made it fairly clear that the amount of authority delegated generally bears a certain proportion to the area of the country which demands self-governing institutions. A parish must have fewer powers than a district and fewer still than a county, and a county cannot be given the full self-government which may be the due of a colony. Again, town populations are so peculiarly constituted that they generally acquire larger powers than the surrounding country. I have also previously noted that distance alone may impose such a limitation on central interference as a fact as to inevitably bring on a corresponding limitation in the theory. Lastly the policy of the central government may, as in fact in the last resort it must always do, determine the amount of power which should be exercised by the local bodies, be they parishes, counties, provinces or colonial governments.

26. Bearing this in mind, it may be said that not every matter which has to be disposed of in the localities is a matter of local interest. It may be so organically involved in the State as a whole, that its conduct may not be safely left to any particular locality. The best general definition I can think of is that everything which whether done ill or well will not materially affect the well-being of the rest of the State, how often soever repeated, is a matter of local interest, since it can be safely left to the local authorities. Matters found by this test to be of local interest may again have to be distributed between larger and smaller local areas by a modified application of the same test. But I am free to admit that no State has yet followed this or any other logical test.

27. Applying this test to distribution of authority within Unitary States, legislation with regard to private relations, administration of justice, foreign relations, military and financial affairs, and to a certain extent the administration

they prefer the Crown colony system not as a desideratum but merely as an escape from what they fear would be a worse evil. Riensch, *Colonial Government*, Ch. XI.

of public health and public charity, would by their nature seem to be removed from local control. There is of course even then nothing to prevent the Central Government from utilising the services of the local authorities as agents for the performance of one or more of these services on its behalf. And this is done so frequently as often to cause no small amount of confusion in determining the boundaries of what are matters of local as distinguished from matters of central interest. The amount of control which the Central Government exercises over the local authority in any particular matter, if very large, may often furnish a conclusive argument in favour of treating that matter as one of central interest (a). But the absence of such control or the exercise of it in an indirect way does not necessarily make it a matter of local interest, for it is quite usual for the Central Government in some countries as in England to rely entirely on the local authorities for the execution of almost all central services. From all these considerations, the conclusion, I am afraid, is unavoidable, that for any particular locality, those matters must be treated as matters of local interest which the State chooses to treat as such.

Which is  
nowhere  
followed

28. For instance, in England, poor-relief, sanitation, education, highways, cemeteries and burial grounds, and police (b) are amongst other matters regarded as of local interest. In India, the functions of the Rural boards were summarised in 1909 in the Decentralisation Commission's Report as being "the maintenance and improvement of roads and other communications, education, specially in its primary stages, the up-keep of medical institutions, vaccination, sanitation, veterinary work, the construction and maintenance of markets and rest-houses and the charge of pounds and ferries". They might also be called upon to devote their funds to famine relief and towards preventive measures in regard to plague and other epidemics—so entirely does the authority of local bodies rest on the will of the Central Government in most cases. The functions of the Municipalities are similarly summarised as consisting of "the construction, up-keep, and lighting of streets and

Matters  
which are re-  
garded as of  
local interest  
(i) In Eng-  
land

(ii) In India.

(a) See Lecture XX *infra*.

(b) In Ireland and India, "police" is a function of Central Government.

(iii)  
In Prussia.

roads and the provision and maintenance of public and municipal buildings, the preservation of public health, principally with reference to provision of medical relief, vaccination, sanitation, drainage and water supply and measures against epidemics, education and famine relief" (a). The point of view of the Prussian administration may be partially illustrated by the distribution of functions amongst the central and local authorities in the Government District (which stands between the larger unit of the Province and the smaller one of the Circle), the Government Board (which is wholly official) and the District Committee (which is predominantly lay). The management of the domains of the State, of the central taxes and of education (*i. e.* on its pedagogical side) and the control over the churches belong to the former, but the management of police matters and the supervision of the subordinate authorities, particularly of the local corporations, belong to the latter (b).

Corporate  
character of  
local units.

29. The only other observation of a general nature which I propose to make upon the present topic is with regard to the legal character of the smaller local self-governing units which I have just considered. They have almost invariably been erected into bodies corporate, the original purpose of this step having been everywhere to enable the authorities to hold property and to sue on its own account and to be sued with regard to such property. The necessary consequence of this has been to reduce their association with the State, even in those countries where local authorities have been normally regarded as public bodies and not assimilated as in England to private corporations. These local corporations in fact possess in the eye of law the status of "persons" and may be sued on their contracts as also in tort like any private subject. In systems in which the right to sue the Government (*e.g.* in England and the United States) is generally denied, this has materially extended the remedies of the subject for wrongs committed by or on behalf of public authorities (c),

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(a) Decentralisation Commission's Report, pp. 250, 272.

(b) Goodnow, *Comparative Administrative Law*, i, 367.

(c) See Goodnow, *Comparative Administrative Law*, Vol. II, pp. 152-154.

## LECTURE IX

### ORGANISATION OF CENTRAL CONTROL IN THE LOCALITIES.

1. The discussion in the last lecture made it clear that the manner in which power is to be distributed between the central and self-governing local authorities, using this latter expression in its widest sense to cover on the one hand self-governing colonies, and parish and communal councils on the other, depends so much upon circumstances and the will of the Government that it is really not possible to generalise on it. Of the more or less indirect and (in some countries) even direct control which the central authorities exercise over self-governing local bodies in matters regarded exclusively as of local interest, I have already spoken in the last lecture. It is now necessary to consider the manner in which the Central Government in different systems exercises its authority in matters affecting the localities which it chooses to retain in its hands.

Organisation of central control in matters not delegated to self-governing local bodies.

2. Looking at the matter from an abstract point of view, there appears to be two alternative methods by which the Central Government may elect to exercise its authority in the localities in matters pertaining to the localities which it chooses to retain in its hands. It may rely entirely on the self-governing local authorities for the performance of central functions, subject to more or less effective supervision on the part of the central authorities, or it may perform all central functions by officials appointed by itself. Perhaps the best illustrations of these extreme methods will be found, as to the first, in the manner in which the authority and functions of the German Empire are exercised within the States of the Empire, and, as to the second, in the organisation of the United States Federal administration within the States of the Union (a). In most countries, however, the Central Government use both agencies. At any rate, since in no country (in so far as the same is organised as a Unitary

Instruments of central control in the localities.

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(a) See Lowell, Governments and Parties in Continental Europe, Vol. 1, p. 243.

State), are central and local functions distinguished with absolute precision, the local authorities *appear* to be discharging some of the functions of the Central Government as its agents, even when, they are not, as in Prussia, expressly and as a matter of policy charged with the performance of some central functions (a). Finally it must be noted that there may be local areas possessing no self-governing organisation whatever, so that all governmental functions in such areas must be performed by officials of the Central Government. Between self-governing colonies possessed of very nearly full internal sovereignty and areas under the direct control of the Central Government of the character last mentioned there must exist therefore a gradation of forms permitting the exercise of direct authority by the Central Government in degrees which vary inversely with the extent of authority exercised by the self-governing local institutions either independently or as agents of the Central Government. A place in such a scheme may, I think, be found also for such forms (noticed above) as prevail in Federal unions like that of Germany and the United States.

Gradations of forms of distribution of power between the central and self-governing local authorities.

Distribution of functions as between the Home Government and Self-governing colonies in the British Empire.

Powers retained by the former.

3. Beginning now at the point where the exercise of central authority in a local area has the smallest scope, viz: with the Self-governing colonies of the British Empire, they are, I need hardly say, (i) the Australian Commonwealth and its six component States, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, (2) the Dominion of Canada, (3) Newfoundland, (4) New Zealand, (5) the Union of South Africa. The Mother Country retains exclusive control over foreign relations (if foreign commerce be excluded from this category, for they are free to conclude commercial treaties with foreign countries over the head of the British Government), and over the military and naval affairs of the colonies such control as makes the Colonial Governments in their administration of these matters, within the powers conferred on them, agents of the Home Government; and sends

(a) In the constitutions of Federal unions only are the functions of the National Government and of the constituent States distinguished with any degree of precision, and that makes it possible to say that such and such functions of the Union Government are discharged by officials of the Union and such others by the State authorities.

out Governors and Governors-General who occupy in relation to the local representative legislatures a position analogous to that of the Crown in England, exercising however a somewhat larger veto power than is possessed by the Crown in England. It is in fact through the Governor's veto, that the Home Government can exercise any control over the internal administration of the colony, for in all matters affecting the internal affairs of the colony, the Governor is bound to act on the advice of ministers responsible to the local legislatures, and the Home Government has no control over any public officer except the Governor. Since all legislation by the Colonial Parliaments requires the assent of the Governor, there are no legal limits to the exercise of the Governor's veto. But by constitutional practice the disallowance of colonial Acts is confined to two classes of cases: (1) "Where in the opinion of the law officers of the Crown, a colonial enactment is *ultra vires* (a); and (2) where, if a colonial enactment stands, imperial interests would be prejudiced" (b); and as to even this latter class of cases, the instances in which the colonial legislature is over-ruled is growing smaller, as the interpretation of "Imperial interests" is becoming narrower in scope (c). Apart from the veto exercisable through the Governor, the constitutions of Self-governing colonies reserve power in the Crown to disallow legislation which has received the assent of the Governor within a specified period and require certain other laws to be reserved by the Governor (and he may reserve others at his discretion) for the signification of the Royal pleasure. But the exercise of the direct veto

Governor's veto the medium through which Home Government may influence internal administration.

Constitutional practice as to the exercise of the veto.

Crown's power of disallowance.

(a) The lawmaking authority of colonial legislatures is not unlimited. The limits are first, that its acts can apply only within the territories of the colony and, secondly, they must not be "repugnant to the laws of England," i. e. they must not conflict with an Act of the Imperial Parliament intended to bind the colony. The Imperial Parliament is, of course, under English Constitutional Law, in theory, not deprived of sovereign authority over any part of the Empire by the grant of responsible government. But here, as elsewhere, constitutional practice is more important than constitutional law. The British Parliament does now occasionally legislate for Self-governing colonies, but either by agreement with or on the application of these colonies. It has to do so for laws which are to extend beyond the limits of the colonial territory.

(b) Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, p. 80.

(c) Trotter, *Government of Greater Britain*, p. 20.

Jurisdiction of Privy Council over colonial litigation—its significance.

Crown colonies.

Two types.

Crown colonies without a representative legislature.

India.

of the Crown is limited by the same consideration as that of the Governor. The jurisdiction of the Judicial Committee of the Privy Council to hear appeals from these Colonies is no doubt an important link connecting the Home and Colonial administrations, but it is not a control which the Home executive exercises over the colonies.

4. For convenience of comparison, I shall next take up the Crown colony governments of the British Empire. These fall broadly into two classes ; (i) those which possess a wholly or predominantly representative local legislature (but not an executive responsible to that legislature) and (ii) those which have legislatures which are not representative or which possess no legislatures at all. Between the two classes of this latter group, there may be an intermediate form, *viz* : that in which the Executive Council of the Governor (a Governor has not an Executive Council everywhere *e. g.* in Gibraltar, Wai-hi-wei and Northern Nigeria) is also the Legislative Council ; at least this was the case with India before the Charter Act of 1833, India from that date till to-day coming within the description of Crown colonies without a representative legislature. I treat all the varieties of Crown colonies mentioned in group (ii) above as belonging to one class, because, the legislatures where they exist, being wholly or predominantly official, at best act as advisory bodies, and the Government is carried on by the Home authorities directly through their agents in the colonies. Even as regards the first group of colonies, the position of the administration is not intrinsically different, for the executive is not bound to accept the direction of the Legislature in matters of administration, and this must be ordered from England according to very much the same methods which govern in the other Crown colonies. Between the other Crown colonies and India there is one important difference. The Home authority which controls the Indian Government is for most purposes not a single Minister, but a Minister associated with a Council the majority of whom are ex-Indian officials. The relations of the Secretary of State for India with his Council I shall consider in another connection. My present concern however is with the organisation of the local administration in these colonies, and as the administration in all forms of Crown colonies is of one type, it will be possible to state its charac-

teristics in a more or less general form, noting, as I proceed, special features belonging to particular groups or individuals amongst these colonies.

5. "The relation of the Crown colonies to the United Kingdom," says Mr. Trotter (a), speaking of Crown colonies not possessing representative legislatures, "is extremely close. Not only is the Governor appointed directly by the Home Government, but also all the principal public officers, and most, if not all, of the members of the Legislative Council (b). It has thus practical control over all legislation (c) and the finances of such colonies (d). The annual budget is approved of by it, and no act of an unusual nature can be done without its sanction. Elaborate rules have been laid down by the Colonial Office for the guidance of Governors and other colonial public servants, even as to the kind of paper and ink to be used in writing despatches to the Home Government. It has been wittily said that in a Crown colony there is 'too much Crown and too little colony.'"

Relation of the Home Government (i) with Crown colonies without representative legislatures.

6. Of the relation of the Home Government to Crown colonies possessing representative legislatures the same author says :—"The Executive officers, such as the Colonial Secretary, the Colonial Treasurer, the Attorney General etc., are appointed by the Crown or the Governor independently of the wishes of the Representative Assembly and do not depend for holding office

(ii) With Crown Colonies possessing representative legislatures.

(a) The Government of Greater Britain, pp. 34-35.

(b) This of course would not be true of Crown colonies with wholly or predominantly elected legislatures. The nominated members of the Indian legislatures owe their appointment to the local authorities.

(c) This would not of course be true of Crown colonies with representative legislatures.

(d) Crown colonies possessing representative legislatures have control over their finances in theory. But recent events in Malta & Jamaica prove that in all cases of difference between them and the Home Government the Colonial legislatures must yield. See as to Malta, Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, pp. 94-95; a tax was imposed by Order in Council (power to make laws by Order in Council having been reserved) for expenses of sanitary works not sanctioned by the local legislature; and as to Jamaica, Reinsch, *Colonial Government*, pp. 216-218. Here the Governor was directed to appoint the full number of official members and thereby create an official majority in order to enforce a retrenchment on the expenditure for education which was not favoured by the local legislature.



upon retaining the support of the majority of the members of the Assembly. They resemble Self-governing colonies in having representative institutions and Crown colonies proper in so far as the Home Government, though its control is less direct than in the case of Crown colonies proper, still exercises a supervision unknown in the case of Self-governing colonies. The Crown (except in cases in which power to legislate by Order in Council has been reserved) has no more than a veto on legislation but the Home Government retains the control of of public offices" (a).

(iii)  
With India.

7. Perhaps the best account of the relation of the Home Government to India is that contained in Part I, Ch. I, of the Decentralisation Commission's Report, and for my present purpose, the following account made up of extracts from that Report (adapted where necessary) will suffice: The Secretary of State for India has the power of giving orders to every officer in India, including the Governor-General. Of his powers and duties (under 21 and 22, Vict. c. 106, reproduced in sec. 2 of the Government of India Act of 1915 which authorises him *inter alia* to "superintend, direct and control all acts, operations and concerns which relate to the government or revenues of India, and all grants of salaries, gratuities and allowances and all other payments and charges out of or on the revenues of India") many rest on his personal responsibility; others can be performed only in consultation with his Council and for some of these, mainly relative to financial matters, the concurrence of a majority of the Members of the Council is required. The Governor-General, the Governors of Bengal, Madras and Bombay, the Commander-in-chief and the Members of Council for India, Bengal, Madras and Bombay are appointed by the

(a) Trotter, Government of Greater Britain, p. 44. See on the subjects discussed in this and the previous paragraphs, Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, Ch. V. As to the control of the Home Government on legislation in Crown colonies possessing representative legislatures, Sir Henry Jenkyns writes at p. 94: "It may be that the Governor has not the sole right of initiating legislation and that the budget has to be accepted by the Assembly. But the Home Government may require the Governor to dismiss Ministers for refusing to initiate legislation desired by the Home Government, or for submitting a budget disapproved by that Government; it may require him to veto an Act of which the Home Government disapproves."

Crown whose approval is also necessary to the appointment of Lieutenant-Governors. All expenditures from Indian Revenue whether in India or elsewhere is subject to the control of the Secretary of State in Council, who is required to lay the budget annually before Parliament, with a report on the "Home Accounts" by an independent auditor and to submit therewith a statement showing the moral and material progress of India. There are certain restrictions on the powers of the Government of India and of Provincial Governments in regard to the grant of mining leases and other concessions. Moreover, the Secretary of State's sanction would be required to any new departure of importance in Indian administration, and he has a large control on Indian legislation. The Legislative Councils can discuss budgets but cannot divide upon them (a)

8. To contrast the position of a Governor of a Crown colony with that of a Governor or Governor-General of a Self-governing colony, the former is sometime likened to an absolute and the latter to a constitutional King (b). The analogy is, however, misleading. No doubt the Home Government does show a disposition to rely in a large measure upon the advice of the "men on the spot" in far away colonies upon any question of disputed policy. But that does not prevent it from issuing general and special orders for the guidance of Governors and Governors-General and other local officials in all Crown colonies. The bulk of the Colonial Office Rules and Regulations and the Rules and Standing Orders of the India Office and of the correspondence that passes between these offices and the colonies concerned should alone dispel any notion about the absolute character of the Governor's rule in Crown

Governor in Crown colonies not autocrats.

Colonial rules & regulations limit the exercise of their discretion.

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(a) The Montague-Chelmsford Reform proposals now under consideration by Parliament contemplate the creation in the Provinces of India of representative legislative bodies to whom will be made over the control of certain departments with the consequent disappearance of the control of the Government of India and the Home Governments over those departments. At the outset only matters of provincial and local interest will be transferred to the provincial representative bodies. Over the rest, the control of the Government of India and the Home Government will in theory remain as now, but the expectation is that it will *in practice* be relaxed. See the Report, paras 291-294.

(b) Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, p. 93. See however the qualifying statements in the paragraphs which follow on pp. 93-94.

colonies. It must be observed however that, following Parliamentary precedents, the Home Government as a rule avoids interfering with specific acts and orders, in individual cases, of responsible officials in the colonies. But for this self-denial, ample amends are taken in the shape of issuing Regulations and Standing Orders, often running into details, so as to suggest almost as if the Home Government meant to avoid interfering with the acts of colonial officials by simply forestalling all occasions for such interference by rules.

Limitations  
on the powers  
of Crown  
colony legis-  
latures.

9. It is necessary to add, further, that where in a Crown colony a legislature of any sort exists, it is usual to reserve certain subjects as beyond the scope of that legislature, and to provide a long list of other subjects, legislation on which must be reserved by the Governor for sanction by the Home Government. There is, besides, the universal restriction that money votes must be proposed by the Governor or with his assent previously obtained. These restrictions apart, every colonial Act requires the assent of the Governor and can be disallowed by the Home Government after it has been assented to by the Governor. In the case of Crown colonies possessing representative legislatures, the veto is the only instrument whereby conflict between the Colonial legislature and the Home Government (which is not of infrequent occurrence) may be settled, always, no doubt, to the discomfiture of the former. Accordingly, the constitutional practice in regard to the exercise of the veto over legislation by representative Crown colony legislatures is not the same as that observed with regard to legislation in Self-governing colonies. The old doctrine that the Governor was bound to exercise his discretion upon his own responsibility as an Imperial officer, unfettered by the advice of his Ministers, but in accordance with the instructions of the Crown and after consultation with his Ministers and (in case of assent) satisfying himself by legal advice that no legal objection exists to his assenting, still prevails in these colonies. In the case of Crown colonies possessing legislatures which are not representative, such elaborate provisions for the exercise of the Governor's veto and the power of disallowance by the Home Government may seem at first sight to be superfluous. They serve, however, the very useful purpose of providing the executive with an opportunity of correcting their error even at the last moment.

Constitu-  
tional prac-  
tice as to  
exercise of  
the veto in  
Crown colo-  
nies with  
representa-  
tive legis-  
lature.

Use of the  
veto in colo-  
nies without  
representa-  
tive legisla-  
tures.

10. It follows therefore that except in so far as there may be Municipal and Rural boards exercising real powers of self-direction within the narrow limits of their own jurisdiction, all Crown colonies including India are within the sphere of central control exercised by the Imperial Executive (and for all practical purposes really by certain members of that Executive). The central control exercised in Crown colonies possessing representative legislatures is the same, tempered though it may be by fruitless obstructiveness on the part of the local legislatures (a). The form of government is everywhere bureaucratic. A permanent civil service furnishes to-day the only alternative mode to the Parliamentary form of government for providing that unity which all ordered administrations must have. The forms in which this bureaucracy organises itself for Crown colony government purposes will be considered later on. It will suffice for present purposes to note only that all Crown colony governments are unitary in composition, the Governor or Governor-General (with or without an Executive Council) furnishing the nucleus. Self-governing colonies may unite to form Federal governments, but it is difficult to conceive how there can be a federation within a bureaucracy which is bound by the law of its being to be centralised, if it is not to fall to pieces.

Crown colonies really within the sphere of central control.

Form of government in them bureaucratic and unitary.

Federation of Crown colonies impossible.

11. I shall note however, before passing on to other topics, one characteristic which the bureaucracy which governs the English Crown colonies possesses in common with all bureaucracies which are out-growths of the English constitution. It is a bureaucracy regulated (over-regulated according to some) by "written rules and plain principles." This bureaucracy fails to see that legislatures composed wholly or predominantly of executive officials or official nominees is a political make-believe, because it finds them useful for framing "written rules and principles" which even its own members

Character of Crown colony bureaucracies.

(a) On the subject of conflicts of opinion and authority, Sir Henry Jenkins observes: "These conflicts have led on one side to the establishment of Self-governing colonies where there was an active White population, either without or only a few Coloured voters, and on the other side to the abolition of representative assemblies where a tropical climate enervates the activity of the White population, or where Coloured voters are numerous." *Several West Indian Islands have surrendered their representative legislatures. British Rule and Jurisdiction Beyond the Seas, p. 94.*

Multitude of  
"regulations"  
to guide their  
"discretion."

Resulting in-  
efficiency  
joined with  
honesty of  
administra-  
tion.

The habit of  
excessive rule-  
making pre-  
vents vexa-  
tious inter-  
ference.

may not override. In matters in which the services of these 'puppet' legislatures have not been utilised, and in cases in which there are no such legislatures to utilise, the executive government itself proceeds to lay down "regulations" and "standing orders" in accordance with which, the "discretion" of its agents is to be exercised. This, which I may call the "Parliamentary habit" of controlling subordinate officials, has its drawbacks, and there may be a great deal of truth in the criticism that a multiplicity of rules and regulations hampers the freedom of local authorities and is destructive of individual initiative. But they redeem themselves by securing to the subject, even in the most despotically governed of British Crown colonies, the essentials of personal liberty from arbitrary executive interference. The fact is, meticulous regulation of executive action is inseparable from large delegations of discretionary authority to individual agents (a), if the end sought to be attained is "honest" administration. What perhaps is lost in efficiency is gained in honesty, and this habit of the English bureaucracy of laying down rules and orders for its own guidance is no unimportant part of the framework upon which is built the "rule of law" in the government of British Crown colonies (b).

12. It must be observed moreover that the supervision and control which the Home Government is called upon to exercise upon the legally despotic powers of colonial Governors and Governors-General (c) does not degenerate into "petty supervision and espionage", only because of this prolific rule-making habit. Just as the Local Government Board in England normally refrains from interfering with particular acts of the local authorities under its control, just as the English Parliament criticises but hardly ever upsets decisions

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(a) As distinguished of course from delegations to self-governing elective bodies or to agents operating under the direction of such bodies.

(b) Students of legal philosophy may find exemplified in this process a characteristically British adaptation of the German doctrine of auto-limitation of the State. *Supra* Lecture I, p. 5, n, (6).

(c) The provision of Sec. 33 of the Government of India Act of 1915 hits off this relation so admirably that it may be quoted here: "The superintendence, direction and control of the civil and military government of India is vested in the Governor-General in Council who is required to pay due obedience to all such orders as he may receive from the Secretary of State."

passed by executive departments in individual cases, so also does the Home Government refrain as a rule from directly intervening in the administrative operations of the colonies. In each case the energies of the controlling authority find a more congenial outlet in framing rules and regulations, intended to cover all conceivable contingencies. The views which the controlling authority may entertain on any individual act of the subordinate agency may have no influence in righting an injustice already done, but they crystallise themselves immediately into a precedent for future guidance. A multiplicity of rules and regulations does not sap the *morale* of officials as much as "petty supervision and espionage" did in the Spanish Colonies (a).

13. The English colonial system is so fully representative of all forms of colonial administration that an examination of the colonial systems of other nations may not be absolutely necessary for purposes of comparative study. It may be mentioned however, in passing, as a fact that the French, Dutch and German systems but furnish variations only of the English Crown colony type, and all their colonies are therefore within the sphere of central control, modified in the case of the French colonies by certain features which I proceed to outline briefly as follows:—(i) The French colonies send representatives to the Senate and Chamber of Deputies of France, being regarded for purposes of national legislation as departments of the Mother Country. But they are nevertheless administered by Governors possessing on paper (as in the case of English Crown colonies) plenary delegations of sovereign authority and exercising the same under the superintendence and control of a colonial department of the Home Government. (ii) Since 1854 all the colonies have had local General Councils which at that date (except in Martinique, Guadeloupe, Guiana and Re-union—which have representative elective legislatures from the beginning) were appointive administrative councils rather than legislatures. Between 1871 and 1885, the General Council was in most colonies made elective. In the most important of the colonies, they vote taxes and pass adminis-

French, Dutch and German colonial administration, variations of English Crown colony type.

French colonies.

(a) See Reinsch, *Colonial Government*, p. 172. Mr. Reinsch notes the contrast between the Spanish and the English colonial systems, but does not indicate the cause of the difference.

Inequality of franchise in French colonial legislatures.

trative legislation. Though none of them has developed Parliamentary control over the executive after the manner of the legislatures of the Self-governing British colonies, they certainly exercise more control on the affairs of the colonies than corresponding legislatures in English Crown colonies, and to that extent encroach upon the sphere of central control. In most of these colonies, representation in the General councils is monopolised by a minority of White settlers, the Coloured native population being for all practical purposes disfranchised. As in the case of the English Crown colonies of the West Indies, the White minority have proved their unfitness to govern the colonies in the interest of the population of those colonies, and have, in fact, more than the English colonists, constituted themselves into selfish exploiting oligarchies. The encroachments, therefore, into the sphere of the central government, in the French Crown colonies, can hardly be said to constitute "local government" of a very desirable type (a).

Sphere of central control in Federal governments.

At "Theoretical" difficulty.

14. I now proceed to consider what relatively stands for central control in Federal governments. But here, at the outset, one is confronted with a difficulty of a theoretical character—Which in Federal Unions are the supreme and which the subordinate authorities? Is it the Federal government which exercises authority delegated to it by the States or do the States exercise those parts of the sovereignty which the Federal government delegates to them. The question is not answered by merely saying that in some forms the Federal and in others the State governments possess enumerated powers and the State and Federal governments respectively own all residuary powers of government. The answer most agreeable to political theorists seems to be that both exercise powers respectively delegated to them by the real sovereign who lies behind and supplies the motive power to all governments, and this statement finds support in the fact which is regarded as of the essence of all Federal Unions, viz: that the citizens of the States are also, in law, the citizens of the Union. But whatever difficulties there may be in formulating a theory of the distribution of powers between Federal and State governments are more than compensated by the facilities which their written constitutions provide for delimi-

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(a) Reinsch, Colonial Government, Ch. XI.

ting their respective powers in practice and these advantages are not lessened by the known tendency which all Federal governments develop to expand at the expense of the States by constitutional conventions and judicial interpretation even where in theory (as in the United States and Australia) they are not possessors of the residue mentioned above. On the other hand, the distribution in every case (so far at any rate as existing instances are concerned) being the result of agreements arrived at *ad hoc* between originally independent units, they present peculiar difficulties in the way of framing general statements applicable to all forms of Federal Union. It seems however certain that what are now Unitary governments, e. g. Britain, France and Italy, are finding the increasing burdens of their administrative duties inadequately relieved by delegations only in favour of self-governing municipalities and rural corporations, and this seems to be even more the case with India, where though there are "Provinces" and "Local Administrations" installed over them, "the Provincial Governments scarcely deserve the name" being "merely the Government of India operating in the Provinces" in very much the same way as the government of the Crown colonies was shown to be the Home Government operating in those colonies. There is therefore in the near future a possibility of Federal governments developing within Unitary governments, though up till now (except perhaps in Brazil) they have grown out of treaties made between independent or semi-independent Governments. Though therefore the difficulties of generalising on existing forms of Federal governments may have to be admitted, the duty of drawing what lessons they may afford for future application can scarcely be safely shirked.

No practical difficulty in discriminating Federal and State functions in individual instances.

Why general statements applicable to all cases peculiarly difficult.

Possible development of Federal organisation in existing Unitary governments.

Lessons to be gathered from existing forms.

15. First, existing Federal Unions, being as much the products of negotiation and compromise as of hard thinking, naturally present quite an unusual number of anomalies. This observation applies with less force to the later Unions within the British Empire than to the United States and Germany. The distribution of functions amongst Federal Unions of the future ought to be simpler and more scientific.

(i)  
Distribution power in future federations should be simpler and more scientific.

16. In the next place, the essence of a Federal Union being that the citizens of the States are also citizens of the



(iii)  
The Union Government should have all necessary powers but none which can be left to the States.

Union, there ought not to be too great a jealousy of the authority of the Union Government. Nothing is gained and a great deal of inconvenience is caused by the excessive decentralisation in the administration of justice in the United States and the separate machinery which exists for each State for turning out rules of private and precedural law. Nevertheless, it is right that the Union Government should not retain in its hands anything that can be better managed by the States. In such matters the necessary degree of uniformity may be secured by giving the Union Government larger legislative powers than are implied by the particular departments or charges which are reserved to it as its exclusive sphere. The provisions in most Federal constitutions giving the Union and the State Governments concurrent powers of legislation in a number of matters, the Federal law prevailing in case of conflict, are means towards the same end. But the Union Government so far from being too ready to legislate in such matters should rather use these provisions for carrying on experiments with a view to further delegations of functions in relation even to these matters by means of constitutional conventions.

(iii)  
The minimum powers to be reserved to the Union Government.

17. Again, though it is better that the States should reserve rather more autonomy than is absolutely necessary, seeing that if it has less, the deficiency may not be promptly supplied (since no Central Government is easily persuaded to part with power it has once got into its hands) the reservations on behalf of the States should never be such as to affect the striking power of the Federal Government whether in repressing internal disorder or in resisting external aggression.

(iv)  
Reduplication of functions of functionaries to be avoided, but so as not to make Union Government entirely dependent on the States.

18. Lastly, in the interest of economy, it should be possible for the Federal Government to use largely the machinery of the State Government for the performance of its appointed functions, though the dependence of the Union on the State Governments should not be so great as to make it possible for refractory members amongst the latter to reduce the Federal Government to impotence.

Distribution of functions between Union and State Governments.

19. The circumstances which attended the federation of the Canadian, Australian and South African Governments make it probable that they, rather than the Unions of independent States like those of the United States and Germany,

will furnish precedents for adoption in federations which in future may grow out of Unitary States. I therefore give here in brief outline the manner in which the functions of Government are distributed in them between the Union Government and its constituent States. The Commonwealth of Australia administers customs, excise, ports, naval and military affairs, defence, lighthouses, light-ships, beacons, buoys and quarantine, and possesses besides considerable powers of exclusive legislation, even in matters distinct from the purely federal relations, e. g., concerning marriage and divorce, banking, insolvency, arbitration of industrial disputes and old age pensions. Amongst matters over which the Commonwealth Parliament has concurrent jurisdiction, some can be exercised with the consent, concurrence, at the request of, or on reference by, the States concerned. The Central Government lacks the authority of directly negating Provincial legislation. Under the Australian constitution, the States possess all residuary powers, the Federal Government being an authority of enumerated powers. In Canada, on the other hand, Provincial Governments were made decidedly subsidiary to the Dominion Parliament which exercises a power of revision over legislation in the Provinces. Many fields of jurisdiction which lie beyond the strictly common interests of the whole dominion are occupied by the Dominion Government which deals exclusively with public finances, trade regulation, postal service, currency, coinage, banking, navigation, defence, law relating to crimes, bankruptcy, copyright, probate, marriage, divorce, naturalisation and Indian affairs; whilst in agriculture, quarantine and emigration matters the Provinces have concurrent jurisdiction. Under the Canadian constitution, the Provinces are authorities of enumerated powers, the Dominion Government possessing general sovereignty, limited by the specific grants to Provincial Governments and the few remaining and rarely exercised rights of the British Crown and Parliament. By the South Africa Act of 1909, the Provincial Councils may make ordinances not repugnant to any Act of the Union Parliament in relation to matters coming within enumerated classes of objects, e. g. education, agriculture, hospitals and charitable institutions, municipal and other similar institutions, local works, roads, bridges, markets, ponds, fish and game preservation and all other subjects on

(i)  
In Australia.

(ii)  
In Canada.

(iii)  
In South  
Africa.

which Parliament shall by law delegate the power of legislation to the Council. The South African Governments have really accepted the position under the Union Government of of rather large autonomous provinces. The South Africa Act of 1909 is perhaps the most instructive of the several experiments in federation within the British Empire for the purpose I have mentioned. (a).

Selection of agencies for execution of federal powers as determining distribution in practice.

20. From what I have said above regarding federal forms of Government, it must be clear that except were the Federal Government employs its own agents for the execution of federal laws and performance of federal services within the States (b) the sphere of direct action on the part of Government within the State territories must be practically non-existent. It must in such a contingency content itself with laying down general regulations and supervising their execution by the States.

Circumstances indispensable to Federal Unions.

21. It ought perhaps to be added that writers on political science commonly regard four circumstances as invariable concomitants of a Federal Union. They are, first, that the citizens of the component elements are regarded also as citizens of the Federal Government ; secondly, that there must be an organic Act or constitution defining the relation between the Union and the parts of which it is composed and marking out for each its own sphere of action ; thirdly, that this paramount constitution should be written ; and, lastly, that there must be a common tribunal empowered to interpret the prescriptions of the federal constitution, to judge of the respective spheres of the Union and State Governments and to hold in restraint the tendencies of each to encroach upon the domain assigned by the constitution to the other (c).

(a) See Reinsch, *Colonial Government*, Ch. XIII, and Trotter, *Government of Greater Britain*, Chs. VII, X and XI for Australia and Canada ; and Halsbury's *Laws of England*, Vol. X p. 552, for South Africa.

(b) Upon this matter, a variety of practices prevails. In Germany, the Empire relies mainly on the State authorities, whilst there is little dependence on them by the Federal Government of the United States. The constitution of Mexico expressly lays down (by Art 814) the obligation of State authorities to publish and enforce Federal laws, whilst that of Brazil provides for the execution of Federal laws normally through Federal officials, though under Art 7 State Governments, if consenting, may be entrusted with this duty. See Dodd's *Modern Constitutions*, under respective titles.

(c) See, Garner, *Introduction to Political Science*, pp. 153, 157-158, Dicey, *Law of the Constitution*, 6th Edn., Ch., III.

22. It is obvious that within Unitary States there must be organisations for carrying on the functions of the Central Government within the localities, even where self-governing local organs exist, and more so where no such organs have been created, or where those which have been created have been given very restricted powers. Where self-governing local organs exist, the Central Government may conceivably use these organs as its agents for all or a limited number of central purposes, or may prefer to act entirely through its own officials.

Performance of central functions in the localities within Unitary States.

23. Where central functions are discharged mainly through official agencies, the jurisdiction of official authorities need by no means coincide with the local self-government circumscriptions. In France and Germany, for instance, judicial districts do not coincide with local self-government districts, and in India they do not strictly agree either with local self-government or even with the collectorate circumscriptions. In England, between 1834 and 1902, even local government districts created for different purposes did not coincide, producing a situation of which hardly any parallel could be found in any other country. The strongest argument in favour of unifying local areas for both central and local government purposes is that it permits in varying degrees the employment of the same agencies for carrying on both kinds of functions, thus securing both economy and unity of administration, and recent developments in all countries have accordingly been in that direction. For all that, however, for many Central Government purposes, the local areas must differ from self-government areas, being determined thereto by the special purposes in hand.

Local areas for exercise of central functions may not agree with similar areas for local self-government.

Tendency towards unification.

Absolute correspondence impossible.

24. Indian administration by itself presents perhaps as many variations as there may well be in local distribution of central functions, on account both of its extensive area and the very small share of administrative work assigned to self-governing local authorities. First, there are the Provinces (mis-called in Indian statutory language, Local Governments or Local Administrations); then (except in Madras) Divisional Commissionerships; and lastly Districts and their Sub-divisions, all of which have been previously described. But for military purposes, the whole of India is divided into five great territorial commands. Within the Provinces, Inspectors of School and Executive Engineers have charges which do not necessarily correspond with district or divisional limits. Again, though

Administrative circumscriptions in India.

it is usual to regard the Commissioner and particularly the District Officer as the heads of the administration within their respective areas for all purposes, some of the functions, e.g. those of Police, Forest administration, Public Works, Public instruction, Hospital and Sanitation, Prison, Excise, Agriculture and Land Revenue Settlements, have been placed under special departments directed from the headquarter of the Province, for all practical purposes independently of the Collector and Commissioner, though these officers may still exercise varying degrees of "outside" supervision over the staff of the special departments within their jurisdiction.

Distribution of functions between the Government of India and Provincial Governments, a matter of executive arrangement not provided by law.

25. As agents and mandatories of the Government of Indian (and through it of the Home Government), the Provincial Governments exercise certain specified functions. The distribution of central authority between the Government of India and the Provincial Governments is roughly as follows:— The Government of India retains in its own hands all matters bearing on foreign relations, the defence of the country, general taxation, currency, debt and tariffs, posts, telegraphs and railways, whilst ordinary internal administration, the assessment and collection of revenues, education, medical and sanitary arrangements, and irrigation, buildings and roads fall to the share of the Provincial Governments. The duty of administering the law rests with the Provincial Governments and with the local courts and authorities, the Government of India being mainly responsible for the excellence and imperfections of the laws themselves (a). This distribution, however, is entirely a matter of executive arrangement, and is not provided by law, sec. 45 of the Government of India Act merely laying down that "every Local Government shall obey the orders of the Governor General in Council and keep him constantly and diligently informed of its proceedings and of all matters which ought, in its opinion, to be reported to him or as to which he requires information, and is under his superintendence, direction and control in all matters relating to the government of its Province." Contrast with this the position of the Provinces of the South African Union, the most centralised federal union within the British

Contrasted with the distribution of functions between the Union Government and the Provinces of South Africa.

(a) Imperial Gazetteer. Indian Empire, Vol. IV, p. 15. Strachey, India: Its Administration and Progress, 3rd edn., p. 65.

Empire. The reservation of authority in the Provinces is secured by the constitution itself, the Union Parliament only retaining concurrent authority to regulate matters so reserved by Federal legislation, the Federal legislation *ipso facto* superseding all provincial ordinances repugnant to it. The control in other words is entirely legislative, whereas the control of the Government of India over the Provinces is both legislative and administrative control. Therefore, even in matters handed over to the Provincial Governments, the Government of India exercises a general and constant control. It lays down lines of general policy and tests their application from the administration reports and returns relating to the main departments under the Local Governments (a). It also employs expert officers (known as Imperial Inspectors-General) to inspect and advise upon a number of departments which are primarily administered by the Local Governments, including agriculture, irrigation, forests, medical, sanitation, education, excise and salt, printing and stationery and archaeology. The control of the Government of India is, moreover, not confined to the prescription of policy and to action taken upon reports and inspections. It assumes more specific forms. It scrutinises and when necessary modifies the annual budgets of the Local Governments. Every newly created appointment of importance, every large addition even to minor establishments, every material alteration in service grades, has to receive its specific approval and in many cases reference to the Secretary of State is likewise necessary. The practical result is that no new departure in Provincial administration can be undertaken without its preliminary sanction, or, in important matters, without that of the Secretary of State also. Moreover, the general conditions of Government service, such as leave, pension and travelling allowance rules and the public works and forest codes are all strictly prescribed by the Central Government either *suo motu* or on instructions from the Secretary of State. Lastly there is a wide field of appeal to the Government of India, as also to the Secretary of State, from persons who may

(a) These are Revenue, Judicial and Police, Local and Municipal, Financial, Public Works, Education. Decentralisation Commission's Report, p. 16.

deem themselves aggrieved by the action of a Local Government (a).

Control of  
Central over  
Local  
Governments  
in India  
contrasted  
with that  
of the Home  
Government  
over the  
Crown  
Colonies.

26. It is a question whether the above statement does not embody a perceptible departure from the practice usually followed by the Home Government in regulating the acts and conducts of colonial authorities, which I have previously described at length. If it does, is the explanation to be found in the fact previously noted that no authority willingly foregoes powers which it is not obliged to do by compelling circumstance? Assuming however that the Government of India is naturally disposed to limit its interference to a point falling short of that which would make it "petty, vexatious and meddling" (b), the enormous amount of irresponsible authority which (statutes and standing orders notwithstanding) the officials exercise in India, the vastness of the issues involved in her administration and the very insignificant safeguards which exist in the shape of popular control or even public opinion, would by themselves appear to necessitate such a departure. The Decentralisation Commission formulates its considered opinion on this question as follows :—

Opinion of  
the Decen-  
tralisation  
Commission  
on the  
nature of the  
control exer-  
cised by the  
Government  
of India over  
Local Ad-  
ministra-  
tions.

27. "The difficulty of defining the exact limits between 'just control and petty vexatious meddling interference,' recognised by the Court of Directors in 1834, still remains. It is easy to say that the Central Government should confine itself to laying down general principles, and that the detailed application of these should be left in the hands of the Subordinate Governments, but in practice it is sometimes extremely difficult to say what are mere details and whether these may not affect the application of a principle. Again what is normally a detail, properly left to a Local Government, may at a period of political stress (c) or under altered circumstances,

(a) Decentralisation Commission's Report, p 21.

(b) See the extract from the Despatch (accompanying the Government of India Act 1833) from the Court of Directors to the Government of India, No. 44, dated the 10th December 1834, quoted at pp. 22-23 of the Decentralisation Commission's Report.

(c) A case in point is that which arose in the Viceroyalty of the Second Lord Hardinge in relation to the removal of the corner of a mosque at Cawnpore, the agitation over which having passed beyond the limits of the Province, the Viceroy came to Cawnpore and settled the point in person.

become a matter in which the Government of India and even the Secretary of State must assert their responsibilities. It is therefore of paramount importance that the relations between the Government of India and the Provincial Governments should be readily adaptable to new or changing conditions, and should not be stereotyped in the nature of a rigid constitution. It is essential to remember that the mutual relations of the Indian Governments are not those of States or Colonies voluntarily associated in a federal system, where a written constitution is necessary to preserve the original rights of the contracting parties. In India the Provincial Governments are, and should remain, subject to the general control of the Government of India in all respects and their functions and powers should be variable by the Central Government or by the Secretary of State as circumstances require." (a).

28. As normally exercised, however, the control of the Government of India over the Provincial administrations does not materially differ in manner from the practice of the Home Government in relation to the Crown colony administrations. As summed up in the Report of the Decentralisation Commission this control is normally exercised in the following ways :—

Modes of its  
exercise.

(1) By financial rules and restrictions, including those laid down by Imperial Departmental Codes.

(2) By general or particular checks of a more purely administrative nature which may (a) be laid down by law or by rules having the force of law, or (b) have grown up in practice.

(3) By preliminary scrutiny of proposed Provincial legislation and sanction of Acts passed in the Provincial legislatures.

(4) By general resolutions on questions of policy, issued for the guidance of the Provincial Governments. These often arise upon the reports of Commissions or Committees appointed from time to time by the Supreme Government to investigate the working of departments with which the Provincial Governments are primarily concerned.

(5) By instructions to particular Local Governments in regard to matters which may have attracted the notice of

(a) Decentralisation Commission's Report, p. 24.



the Government of India in connection with the departmental administration reports periodically submitted to it, or the proceedings-volumes of a Local Government.

(6) By action taken upon matters brought to notice by the Imperial Inspectors-General.

(7) In connection with the large right of appeal possessed by persons dissatisfied with the action or orders of a Provincial Government (a).

Commissioners, Collectors, Subdivisional officers & Tehsildars.

29. Of the Divisional Commissioner, it is stated in the Report that his work is primarily concerned with the administration of the land revenue and connected questions and he discharges important duties as a court of revenue appeal. Speaking generally, his functions in regard to revenue settlements are mainly advisory, but in regard to the collection of land revenue he has ordinarily certain powers of suspension and, in some Provinces, of remission also. His powers in regard to the appointment of revenue officers vary in different Provinces. Subject to rules and conditions laid down by the Local Government, he can grant loans to landholders and cultivators and remit them when irrecoverable, while he plays a large part in the management of private estates under the Court of Wards (b).

30. The powers of the Collectors, Sub-divisional officers and Tehsildars have been previously outlined. Except when acting as members of Rural and Municipal boards (and in fact though not in law, even when so acting) all these officers, like the Commissioner, exercise within their spheres central government powers.

(a) Decentralisation Commission's Report, pp. 25-26. The Report on Indian Constitutional Reforms recently submitted to Parliament by the Secretary of State and the Viceroy proposes to set up representative legislative bodies who will control through members responsible to them certain specified departments. In respect of such "transferred" subjects, the Provincial Government will to a certain extent be autonomous and free from control by the Government of India and the Secretary of State. But other departments will continue to be administered substantially as at present subject to control by the Government of India and the Secretary of State. The proposals also contemplate the separation of Provincial from Imperial revenues, implying a certain amount of financial liberty.

(b) Decentralisation Commission's Report, pp. 166-170.

31. So far I had been discussing the question of the organisation of central control on the assumption not universally true that all central control is exercised by individual officers appointed by the central authorities or their agents. It would of course not be true in regard to cases where a matter of central interest is made over entirely to local self-governing authorities subject to external supervision by the central authorities. It would be easy for instance to say that the Poor Law administration—a matter of central interest—has in this way been made over to local bodies in England. But the best illustrations of this mode of devolution of authority are to be found in Federal Unions (*e. g.* Germany) and in the case of Self-governing colonies of the British Empire. The powers which these colonies exercise for purposes of defence may very well be viewed as an instance of delegation of central authority to self-governing local councils.

Central functions need not be exercised through individual agents only, but may be delegated to self-governing local bodies.

32. But between these extreme forms, there are intermediate ones. With the official agent may be associated executive or administrative councils, composed wholly of professional officials like himself, or in part or wholly of laymen who again may be nominated or elected. The councillors may conceivably be made colleagues of the official or remain advisers only. The councillors may again be made colleagues for certain purposes and advisers as regards others. In some systems, where councils are advisory only, will be found provisions making it obligatory on the official representative of the Central Government to consult in certain matters but not in others. (a).

Intermediate forms where official agent is associated with a local administrative council.

33. For discharging functions delegated to him by the Central Government, the French Prefect has been given an advisory council, the Council of the Prefecture, which reproduces within the Province several features of the Council of State, the advisory council of the President. The members of this council are appointed and dismissed by the President of the Republic, draw salaries and may not follow any other occupation. The Prefect is bound to consult it in many matters

The Prefect and his Council in France.

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(a) I need hardly say that the present discussion concerns only councils associated with subordinate executive officials not the Executive Councils of the Chief Executive of an independent nation, which will be separately considered.

though he is never obliged to act in accordance with the advice tendered. In a few matters, however, the Council may act even without the Prefect (a).

The Provincial Governor & his Council in Prussia.

34. In Prussia, since 1875, the Governor of the Province has been associated with a Provincial Council, composed, besides himself, of a single councillor, professional in character and virtually appointed for life, and five unsalaried lay councillors elected for a term of six years from citizens of the Province eligible for membership in the Provincial Diet (the elected local council of the Province) by the Provincial Committee (the elected executive of the Diet). The Governor has to take its consent for all his ordinances. It hears appeals from inferior administrative bodies and decides as executive authority certain administrative matters, e.g. number, time and duration of certain markets and questions relative to the construction of certain roads. No doubt these powers fall a long way short of exhausting the whole field of the Governor's authority, but so far as they go they make the councillors colleagues and not advisers only of the Governor. In fact, in the most important matters affecting the locality, the Council imposes popular control over the acts and resolutions of the Governor.

The Government President and his Councils in the Districts

35. In the smaller Government Districts the functions of the government performable in the District are divided between (i) a Government Board composed entirely of professional officers appointed by Government and belonging to the higher administrative service, presided over by the Government President, and (ii) a District Committee, an administrative council of the type of the Provincial Council presided over by the Government President and composed of two other professional officials appointed for life (one from the judicial and the other from the higher administrative services) and four lay members appointed in the same way as the lay members of the Provincial Council. I have previously spoken of the distribution of functions between these two Committees, one wholly professional, the other predominantly. But for the present it will suffice to say that matters which it is believed will affect the

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(a) See Goodnow, *Comparative Administrative Law*, Vol. I, p. 274-5; Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 37; Grice, *National and Local Finance*, p. 124.

private interests of the citizens most intimately e.g. management of police-matters and supervision of subordinate authorities, particularly local corporations, are within the competence of the latter. The members of both Committees, it should be observed, are in their respective spheres, the colleagues and not advisers only of the Government President (a).

36. In the Circle (the Prussian County) the Government employs as its agent the elected Executive Committee of the Circle Diet, the locally elected organ of local government. The Circle Committee is thus at the same time agent of the Circle Diet and of Government. The official president of the Diet, the Landrath, excepted, all the members of the Committee are thus laymen. It is well known that Prince Bismark's scheme originally was to constitute similar bodies acting as agents at the same time of both the Central and the Local Governments for the Provinces, but he failed to carry it owing to the opposition of the conservative landed interest who would not allow all central government powers of the Province to be handed over to Committees predominantly composed of popularly elected lay councillors (b).

The Burgo-master and his Council in the Circles.

37. Nowhere (with the doubtful exception of England) is the value of local self-government better appreciated than in the Netherland Countries. Originally local units, each of their Provinces has inherited its historic unicameral (directly elected) representative council which looks after the affairs of the Province through a deputation of its members appointed by itself. Both Council and Deputation are presided over by Royal Commissioners, who as agents of the Sovereign 'carry out Royal orders and exercise a general supervision over the acts of the local authorities. Except certain matters (e. g. police and military) which are reserved to the central authority, matters of general equally with those of local interest are administered by local authorities in the government not merely

Local representative councils with official presidents in Holland and Belgium.

(a) Like the Council of the Prefecture in France, the District Committee also acts as an administrative court, sitting when so acting without the Government President. See references cited in the previous note and those in the following.

(b) Goodnow, *Comparative Administrative Law*, Vol. I, pp. 320-8; Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 313-334; also Grice, *National and Local Finance*, Ch. XV.

of the Provinces but also of the Communes (a) which have local councils and executive committees appointed (subject to Royal sanction) by the Communal Councils, of the pattern of those of the Provinces and guided and controlled in the same manner by the Burgomaster, an appointee of the Crown from amongst members of the Communal Council. In theory these Councils are local councils of the Sovereign (just what the Provincial States of the French monarchy would presumably have been had they survived) and the Crown assents to or vetoes their resolutions (b). The Crown approves of the budgets of the Provincial States and the Provincial Deputation those of the Communes within the Province. In regard to these countries, it may therefore be said that central government functions in the localities are performed by representative local legislatures in concurrence with and subject to supervision by Royal officials. The government of England through self-governing local bodies resembles this form most closely, the difference (which is in her favour) being that, in England, local councils have not even official chairmen and they act directly and not through permanent deputations, like the Provincial and Communal Committees.

Similar conditions reproduced in South Africa.

38. It should be remarked that the South Africa Act of 1909 expressly authorises the Union Parliament to delegate to the Provincial legislatures powers other than those reserved to them by the constitution. The delegation authorised is not, as it might have been, to the executive committees of the Provincial Councils, supposing the framers of the Act had chosen to follow the policy but imperfectly carried out in the local government organisation of Prussia, where as previously noticed, the Circle Committee is at once the agent of the Central Government and of the local council.

39. By sec. 84 of the Act, the Chief Administrator of the Province, who is appointed by the Union Government, may act in matters not reserved or delegated to the Provincial

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(a) See on this point Grice's *National and Local Finance*, Chs. VII, XII and XV; Shaw's *Municipal Government in Continental Europe*, Ch. III.

(b) The Provincial Councils are independent of the Royal prerogative, meet without express convocation and can neither be suspended nor dissolved either by the governor or by Royal decree. Grice, *National and Local Finance*, p. 195.

Council without reference to the Executive Committee of that Council. This body differs from the Parliamentary executives of the States or Provinces of the other Colonial Federations within the British Empire in that the members are elected by the Provincial Council and hold office for a term, just like the permanent deputations of the States in Holland. The organisation of the Provincial administration thus seems to have been deliberately intended to follow the Dutch model, a fact which need cause no surprise if it be remembered that the White population of South Africa is predominantly Dutch.

40. From the instances already considered it may perhaps not be impossible to draw certain very broad general inferences as to tendencies. The official representative of the Government, originally unfettered by any co-ordinate control, is first given a council, (which may be advisory or controlling according to national habits). The desirability of making the council partly or predominantly lay and even elective makes itself felt next. The last stage in the process of evolution is marked by a displacement of the associated council by a controlling council appointed by a representative local legislature. The progress in other words appears to be, even in the sphere of local government (using that expression in its largest sense to distinguish it from Government at the capital), from personal rule to cabinet government, understanding by this last expression not necessarily only the informal committees of the councils which hold offices at all times at the pleasure of the majority in the councils but also committees elected by the councils for terms of years, which are sufficiently short to secure agreement in policy between the committees and the councils. It would of course be contrary to facts to suggest that these are the stages which have marked the progress of local institutions in every country, or that the countries which still can show one or other of the earlier forms must necessarily pass through the later stages on their way to the last. In fact, in some countries, *e. g.* Holland and Belgium, owing to historical reasons, the organisation has assumed the final form from the very beginning. The stages indicated can from their very nature be found only in countries which at one stage or another had developed a centralised despotic monarchic organisation, and in some even of these, national or constitutional habits may arrest the development of fully representative local institutions

A study in  
tendencies.

at different stages. It has certainly made greater progress in Prussia than in France where belief in the efficacy of centralised administration, responsibility for which must in the last resort be undivided and personal, appears to be firmly ingrained in the habits of the people.

Illustration  
from British  
colonial  
history.

Instances of  
direct  
government.

Intermediate  
forms.

Cabinet  
government  
in Self-gover-  
ning colonies.

41. The course of development, as I have just traced it, will, I believe, find material confirmation from an examination of English colonial administration. Necessity has driven the protagonists of the most decentralised and least autocratic form of government to establish at different times different degrees and varieties of despotic rule in their far away colonies and dependencies. That rule reaches its vanishing point in the Self-governing colonies. At the other extreme are Crown colonies such as Gibraltar, Basutoland, Wei-hai-wei and Labuan which have neither a legislative nor an executive council. St. Helena has an executive but no legislative council, and India, it is well to remember, passed through a similar stage. A great deal has been already said about Crown colonies possessing legislatures which are not representative and others with representative legislatures which yet have no control over the executive, which need not be repeated here. Only very exceptional circumstances induce the British Government to-day to maintain that extreme form of direct control which is implied in the non-existence of either a legislative or an executive council. In all other forms the executive council is always found associated with the agent of the Home Government in the colonies. In the highest form, the executive council comes to be an informal committee of the local legislature holding office at the latter's will and taking its policy from the local legislature and not from the Governor or the Home Government which he represents. The Governor of a Self-governing colony is, as previously pointed out, only in a slightly less degree, "the minister of his ministers" (a) than the King in England.

42. Of the composition and character of the executive council in Crown colonies, the following is a generalised account based on Colonial Regulations, Chapter I, Sec. III, 23,24: "In Crown Colonies the Executive Council consists of certain principal officers of the Government with or without

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(a) Courtney's Working Constitution of the United Kingdom, p. 86, also pp. 4 to 7, pp. 84-86, p. 160,

the addition of unofficial members. These Councillors are either the holders of offices specified in the Governor's instructions or persons appointed in pursuance either of a Royal warrant or of instructions from the Crown signified through a Secretary of State. The Governor may in cases of vacancies make provisional appointment subject to the approval of the Crown. Members of the Executive Council can be dismissed by the Crown alone, but, in case of emergency, may be suspended by the Governor, who must at once report fully to the Secretary of State the grounds for such action.

Executive  
Councils in  
Crown  
colonies.

43. "The Executive Council has the duty of assisting the Governor with its advice, and the Governor is required in his instructions to consult the Council in all matters of importance, except in cases of urgency (when it is his duty at the earliest practicable period to communicate to the Council the measures he may have adopted and his reasons), and in cases of such a nature that in his judgment the King's service would sustain material prejudice by consulting the Council thereon. Unless otherwise provided in any particular case by law or by his instructions, the Governor may act in opposition to the advice of his Council, but he is then required to report the reasons for his action to the Secretary of State by the first convenient opportunity" (a). He is expected to so act only when the public interest requires him to do so, but as he alone is the judge of that necessity, this power to override the decision of his Council at his discretion reduces the latter in law to the position of an advisory or consultative body only, though normally no doubt the government of Crown colonies must be carried on according to the views and decisions of the majority of the Council (b).

Their rela-  
tions with the  
Governors.

44. The above observations seem to be as well applicable to the Executive Councils of the Governor General and Governors and Lieutenant Governors of India and its Provinces, as to those of the Governors of Crown colonies properly so called. But these are not the only executive councils associated with the representatives of the Crown in the Government of India.

Executive  
Councils of  
India.

(a) *An Analysis of the System of Government Throughout the British Empire.* Macmillan and Co. 1912, p. 108.

(b) See Trotter, *Government of Greater Britain*, p. 38.



The Secretary of State for India himself, unlike that for the Colonies, is associated with a council the composition and powers whereof will require special consideration, as will indeed also those of the executive councils of the Governor General, Governors and Lieutenant Governors.

The Council of the Secretary of State for India.

45. The members of the Secretary of States's Council (called the Council of India) are appointed by the Secretary of State for 7 years with a possibility of a 5 years' extension. The Council is to consist of such number of members, not less than 10 and not more than 14, as the Secretary of State may from time to time determine. At least nine of the Council must have lived in British India for at least 10 years and left it not more than 5 years before the time of his appointment. A member of the Council cannot sit in Parliament. The Secretary of State is the President of the Council and is bound to submit to it every order he proposes to make or to deposit the proposed order in the Council Chamber 7 days previous to a meeting. Orders regarding peace and war or negotiations with Princes or States are excepted, if the Secretary of State considers absolute secrecy essential. In certain matters, e.g. the disposal of Indian revenues, the orders of the Secretary of State must be backed by a majority of the votes at a meeting of the Council, but in other matters he can over-rule the Council (a).

46. The Council of India is thus "in the main an advisory body with a limited power of veto. Even in matters of expenditure, it would be difficult for the Council to continue to resist the Secretary of State when he is the mouth-piece of the Cabinet" (b).

Councillors originally colleagues of the Governor General.

47. The Executive Council of the Governor General of India consists of 6 ordinary members besides the Commander-in-Chief who in practice is always made an extraordinary member. Ordinary members are appointed by the Crown, in practice for 5 years. Three of them must have been at

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(a) Government of India Act of 1915, secs. 3-10, 21.

(b) An Analysis of the System of Government Throughout the British Empire, Macmillan & Co., 1912, p. 166. The Council of the Secretary of State for India may undergo radical alterations should the proposals contained in the Report on Indian Constitutional Reforms recently submitted to Parliament by the Secretary of State and the Viceroy be accepted. Paras. 293-294

least 10 years in the service of the Crown in India, and one must be a barrister of England or Ireland, or a member of the Faculty of Advocates of Scotland of not less than 5 years' standing (a). The superintendence, direction and control of the civil and military government of India is in terms vested in the "Governor General in Council" (b); and it will be remembered that the Regulating Act of 1773 which established this Council contemplated that the administration of the country was to be carried on in accordance with the votes of the majority of the Council and the Governor General had no power to set aside their decisions. The English Parliament was in fact at this date not at all disposed to hand over such an important charge, as the administration of the Indian territories then was and has always been since, to the unfettered discretion of a single ruler, and it was because Lord Cornwallis, when appointed Governor General, made it a condition of his acceptance of the office that the power of over-ruling his Council should be given to him that, in 1786, the modification now embodied in Sec. 41 of the Government of India Act of 1915, was introduced. This section after laying down in terms that "the opinion of the majority of the councillors present shall prevail and that, if they are equally divided, the Governor General or other person presiding shall have a casting vote," goes on to add that "whenever any measure is proposed before the Council whereby the safety, tranquility or interests of British India or of any part thereof, are or may be, in the judgment of the Governor General, essentially affected, and he is of opinion either that the measure proposed ought to be adopted and carried into execution or that it ought to be suspended or rejected, and the majority present at a meeting of the Council dissent from that opinion, the Governor General may, on his own authority and responsibility, adopt suspend or reject the measure, in whole or in part." The

Subsequent changes.

Present relations of the Viceroy to his Council.

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(a) The Montague-Chelmsford Reform Scheme proposes to abolish the present statutory maximum for the Executive Council and the statutory qualification for seats and to secure the appointment of two Indians (the present *practice* is to appoint one) to seats in the Council. See Report, paras 271-272. It also foreshadows the establishment of a Privy Council of Notables, whom the Governor-General may consult on matters of policy and administration. Para 287.

(b) Government of India Act, 1915, sec. 33.

only safeguard against an arbitrary exercise of this discretionary authority to overrule his Council is to be found in the provision which follows that "in every such case any two members of the dissentient majority may require that the adoption, suspension or rejection of the measure and the fact of their dissent, be reported to the Secretary of State and the report shall be accompanied by copies of any minutes which the members of the Council have recorded on the subject" (a). It is further provided by Sec. 43 that when the Governor General visits any part of India without his Council, the Governor General in Council can authorise the Governor General alone to exercise all the powers of the Governor General in Council; and even without such authorisation, the Governor General at such times may issue on his own authority and responsibility any order which might have been issued by the Governor General in Council to any Local Government or to any officers or servants of the Crown acting under the authority of any Local Government without previously communicating the order to the Local Government, and any such order shall have the same force as if made by the Governor General in Council, subject to suspension by the Secretary of State in Council, the same operating from the time of the receipt of the latter's order by the Governor General.

48. The net result of these provisions is, in law, to convert the Council of the Governor General to a consultative body, though as a matter of practice no doubt the ordinary administration of the country is carried on by the opinion of the majority of the councillors.

Executive  
Councils of  
Governors of  
Presidencies.

49. The Executive Councils of the Governors of Madras, Bombay and Bengal consist of such number of ordinary members, not exceeding four, as the Secretary of State directs. Two of the ordinary members of the Executive Council must have been at least 12 years in the service of the Crown in India at the time of appointment. They, as well as the Governor, are appointed by the Crown, in practice for five years. The Governor has the same power as the Governor General of over-ruling his Council in every way, though ordinarily he is bound by the

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(a) Government of India Act, 1915, sec. 41.

opinion of the majority. If the votes are equally divided the Governor has a casting vote (a).

50. A Lieutenant Governor's Executive Council, when there is one, is to consist of such number of ordinary members not exceeding four as the Secretary of State directs ; all appointed by the Governor General with the approval of the Crown for a term which in practice is for 5 years. The Governor General by the notification by which he establishes an Executive Council for a Lieutenant Governor has also to provide for cases of difference of opinion between the Lieutenant Governor and his Council (b). Other "Local Administrations" in India are not embarrassed by any kind of Executive Council whatsoever (c).

Executive  
Councils of  
Lieutenant  
Governors.

51. For Central Government purposes, Commissioners and Collectors act alone. A proposal to provide them with advisory councils was mooted before the Decentralisation Commission but rejected by the majority of the Commissioners, on the ground that in the Municipal and District Boards they have already consultative bodies sufficient for all practical requirements (d).

Commission-  
ers and  
Collectors  
have no coun-  
cil.

52. India seems indeed at the present moment to be far away from the stage when the Executive Councils of her Governors General, Governors and Lieutenant-Governors will be composed, like those of the Commissioners and Burgomasters in Holland and Belgium and of the Chief Administrator in the Provinces of South Africa, of members of locally elected representative legislatures appointed by such legislatures. The other local administrations of India stand even further off from that stage, keeping company in fact with colonies like Labuan, Wei-hai-

The first con-  
dition of  
Cabinet  
Government,  
a represen-  
tative legis-  
lature, is  
wanting in  
India.

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(a). Government of India Act, 1915, sec. 50.

(b) Government of India Act, 1915, sec. 55. An Analysis of the System of Government Throughout the British Empire, p 174.

(c) The Montague-Chelmsford reform scheme proposes to establish Executive Councils in all the Provinces of two members, one Indian and one European. The Executive Councils under this scheme will have no control over the subjects to be transferred to Ministers responsible to representative legislative bodies which also the scheme proposes to establish in the Provinces.

(d) As substantial elected majorities will be secured in these boards under a scheme of local self-government reform recently approved by the Government of India, they may not unlikely serve the purpose of administrative councils to Collectors and Commissioners. See Report on Indian Constitutional Reforms, paras 194-197.

wei and Basutoland. St. Helena with her Executive Council of three nominated members who are not officials, but without a legislative council is in this respect more progressively organised (a). She is further away still from the stage when the members of her Executive Councils shall hold their offices at the pleasure of the majority in representative legislatures, as in the Self-governing colonies. The first condition of progress in that direction, a representative legislature, is wanting (b). But judging from English precedents only, a representative legislature does not necessarily bring with it a council of its own appointees. The members of the Executive Councils of Crown colonies possessing representative legislatures are, like similar officials in Crown Colonies without representative

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(a) The inhabitants of these parts of India may be interested to learn that there is still in the British Empire a single colony, even more primitively organised, *viz* : Tristan da Cunha, a small island in the South Atlantic, where there are no laws or regular government, and the people are under the moral rule of the oldest inhabitant—a reproduction of the patriarchal condition in which in the Pitcairne Islands the descendants of the Bounty Mutineers were found to be living in 1814. This, of course, is possible only in an island settlement with a very small population. An Analysis of the System of Government Throughout the British Empire. Macmillan & Co., 1912, p. 61.

(b) Since the above was written, the Report on Indian Constitutional Reforms submitted to Parliament by the Secretary of State for India and the Viceroy has put forward proposals for dividing the government of the Provinces (not of India) into two parts, one to be controlled as at present by the Governor and his nominated Executive Councillors and the other to be entrusted to the Governor and a Minister or Ministers to be chosen by him from amongst the elected members of the Provincial legislatures which are to be made predominantly elective representative bodies. The Governor and his Executive Council will have exclusive control over all that concern the peace, order and good government of India and other matters not transferred to the Governor and his Ministers. Only specified subjects of provincial and local interest are at the outset to be transferred to the latter, but the Report contemplates the progressive transfer of other subjects until fully responsible government should be finally attained. The Ministers, however, are in the beginning to be appointed for the term and life of the legislatures and are not to be removable by the latter, which moreover are not (to start with) to have power to vote their salaries, and in the beginning, the Governor too will not be bound in all cases to accept the advice of his Ministers, so that during this transitional period of experimentation, he alone will remain responsible for the administration of the "transferred" subjects. But the Report contemplates the early assumption by the legislative bodies of power to vote the Minister's salaries year by year, which itself will make the Ministers dependent on the legislatures in the Parliamentary sense. See the Report, Ch. VIII, paras 214-224, 260.

legislatures, nominees of the Crown and bound to serve its policy and not that of the Legislatures. The reason for maintaining this seeming anomaly is of course to be found (as I have already stated) in the want of capacity shown by these legislatures to govern the colonies in other interests than those of the narrow electorates whom they represent.

53. Regarding India, it has to be noted further that not only are such legislatures as there are in that country not representative, there is also no representative element in the composition of the Executive Councils such as may be found in the Provincial, District and Circle Committees in the local administration of Prussia.

Executive Councils also wholly non-representative.

54. I shall conclude my consideration of the present topic with a brief description of the Indian legislative bodies.

Indian Legislatures.

55. The Legislative Council of the Governor General consists of the members of his Executive Council, the Lieutenant Governor of the Province in which the Council sits, and sixty additional members of whom 35 are nominated by Government and the remaining 25 returned by electorates so contrived as to provide representation for *interests* and not numbers. There must in this Council be an official majority, and no person is eligible for election if declared by the Governor General in Council to be of such reputation and antecedents that their election would, in his opinion, be contrary to the public interest. The ordinary term of office of elected and nominated members is three years, the term of official members and nominated experts being terminable at the will of the Governor General (a).

Legislative Council of the Governor General.

Its composition.

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(a) The Montague-Chelmsford scheme of Indian constitutional reforms, now under the consideration of Parliament, proposes to replace the present Legislative Council of the Governor General by a Council of State and a Legislative Assembly, the former to consist of 50 members exclusive of the Governor General, of whom 21 are to be elected and 29 to be nominated, 4 of the latter to be non-officials and not more than 25 officials including members of the Executive Council. The life of each Council will be 5 years. The Legislative Assembly is to consist of 100 members of whom two-thirds are to be elected and one third nominated, not less than one third of the latter to be non-officials. Official members of the Council of State will be eligible also for nomination in the Legislative Assembly. As under the scheme responsibility for the "peace, order and good government" of the country is to be retained exclusively in the hands of the Government of India, the Council of State which will possess a perpetual Government majority is to be given exclusive control over legis-

**Powers.**

56. Subject to restrictions to be presently mentioned, the Legislative Council of the Governor General has power to make laws

(a) For all persons, courts, places and things within British India.

(b) For all subjects of his Majesty and servants of the Crown within other parts of India.

(c) For all Native Indian subjects of His Majesty without and beyond as well as within British India.

(d) For the government of officers and soldiers of His Majesty's Indian forces, wherever they are serving, in so far as they are not subject to the Army Act.

(e) For all persons employed or serving in or belonging to the Royal Indian Marine Service and

(f) For repealing or altering any laws which for the time being are in force in any part of British India or apply to persons for whom the Governor General in Legislative Council has power to make laws.

**Limitations  
on its powers.**

57. But the Council is not authorised unless expressly empowered by Act of Parliament to make any law repealing or affecting

(i) Any Act of Parliament passed after the year 1860 and extending to British India (including the Army Act and any Act amending the same) or

(ii) Any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India.

58. Nor has it power to make any law affecting the authority of Parliament or any part of the unwritten laws or constitutions of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the Sovereignty or dominion of the Crown over any part of British India; and it cannot, without the previous approval of the Secretary of State in Council, make any law empowering

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lation which the Governor General in Council will certify as coming within the reserved powers of the Government. Other bills will require being passed by both Houses and when there is difference between them by a joint session.

any Court, other than a High Court, to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any High Court.

59. Also, except with the previous sanction of the Governor General, no measure may be introduced affecting

(a) The Public Debt or Public Revenues of India, or imposing any charge on the revenues of India, or

(b) The religion and religious rites and usages of any class of British subjects in India, or

(c) The discipline or maintenance of any part of His Majesty's Military or Naval forces, or

(d) The relations of the Government with foreign Princes or States.

60. The assent of the Governor General is necessary before any Act passed may become law, and the Governor General may reserve the Act for the signification of His Majesty's pleasure thereon through the Secretary of State in Council. Also, the King may disallow any Act through the Secretary of State in Council (a). The veto.

61. Of the composition of the several Provincial legislatures, it need only be said that the members thereof are recruited in much the same way as those of the Council of the Governor General, a considerable number being officials and some nominated non-officials and others returned by electorates so contrived as to represent *interests* and not numbers. The number of non-officials elected as well as nominated, taken together, has to constitute the majority of councillors, differing in this respect from the proportion observed in the Governor General's Council. But, except in Bengal, the elected members are in a minority, being in Bengal slightly in excess of the combined strength of the permanent official element and the nominated official and non-official membership (28 to 26). (b). Provincial legislatures.

(a) Government of India Act of 1915, secs. 65-69. In the Montague-Chelmsford scheme of Indian constitutional reforms the Governor General and the Crown retain the powers of assent, reservation and disallowance.

(b) See Iyengar's "Indian Constitution," 2nd edition, Table at p. cxvii, showing the relative strength of the elected and nominated and the official and non-official elements in the composition of the Supreme and Local Legislative Councils. In the Montague-Chelmsford scheme of Indian constitutiona



Their powers.

62. The Local legislature of a Province has power, subject to the provisions of the Government of India Act, to make laws for "the peace and good government" of the territories for the time being constituting that Province. With the previous sanction of the Governor General it may repeal or alter as to that Province any law made by any authority in British India other than that local legislature, but it may not, without the previous sanction of the Governor General, make or take into consideration any law

Limitations  
on their  
powers.

(a) Affecting the Public Debt of India or the customs duties or any other tax or duty for the time being in force and imposed by the authority of the Governor General in Council for the general purposes of the Government of India, or

(b) Regulating any of the current coin or the issue of any bills, notes, or other paper currency, or

(c) Regulating the conveyance of letters by the post office or messages by the electric telegraph, or

(d) Altering in any way the Indian Penal Code, or

(e) Affecting the religion or religious rites and usages of any class of British subjects in India, or

(f) Affecting the discipline or maintenance of any part of His Majesty's naval or military forces, or

(g) Regulating patents or copy-rights, or

(h) Affecting the relations of the Government with foreign Princes or States.

reforms, it is proposed to establish for each Province an enlarged Legislative Council with a substantial elected majority. The Council is to consist of (1) members elected on as broad a franchise as possible, (2) nominated members including (a) official and (b) non-official and (3) *ex officio* members. The Governor and his Executive Council are to retain full responsibility over matters affecting the "peace, order and good government of the country," as also over departments which will not have been made over to Ministers responsible to the newly constituted legislative bodies. Therefore, though all legislation must normally be passed in the Legislative Council, the Governor has power to certify that a certain bill concerns the peace, order and good government of the country or that it relates to one of the reserved subjects, in which case it would, broadly speaking, be enough if the bill be passed by the Grand Committee of the Legislative Council, which is to comprise from 40 to 50 per cent of the Council, the members to be chosen partly by election by ballot, partly by nomination. The Governor would have power to nominate a bare majority in addition to himself, but not more than two thirds of the nominated members are to be officials.

63. But an Act or a provision of an Act made by a local legislature and subsequently assented to by the Governor General is not to be deemed invalid by reason only of its requiring the previous sanction of the Governor General under this Act.

64. No member of any local Legislative Council can, without the previous sanction of the head of the Provincial Administration, introduce any measure affecting the public revenues of the Province or imposing any charges on these revenues.

65. Any Act passed by a local legislature requires the assent of the head of the Provincial Administration and also of the Governor General ; and the Crown through the Secretary of State may disallow an Act already passed as aforesaid (a).

The veto.

66. A further restriction on the legislative power of both the Supreme and the Provincial legislatures is that implied in the provision, now embodied in Sec. 32 of the Government of India Act of 1915, to the effect that "every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act of 1858 and this Act had not been passed," and this provision has been interpreted to mean that the legislatures in India are not authorised to make laws taking away the right of action of any person against the Government of India saved by this section (b). Sec. 84 of the Act on the other hand provides that any law passed by any authority in British India shall not be deemed invalid solely on account of any one or more of the following reasons :—

Indian legislatures cannot take away the right of British Indian subjects to sue Government.

(a) In the case of a law made by the Governor General in Legislative Council or a local legislature, because it affects the prerogative of the Crown, or

(b) In the case of any law, because the requisite proportion of members not holding office under the Crown in India was not complete at the date of its introduction into the Council or its enactment, or

(a) Government of India Act of 1915, secs. 79-82. In the Montague-Chelmsford reform proposals, these powers of the Governor etc., the Governor-General and the Crown are to be retained.

(b) *Secretary of State for India in Council v Moment*, L. R. 40, I. A. 48 ; I. L. R. 40 Cal. 391 ; 17 C.W.N. 169.

(c) In the case of any law made by a local legislature, because it confers on Magistrates, being Justices of the Peace, the same jurisdiction over European British subjects as that legislature by Acts duly made could lawfully confer on Magistrates in exercise of authority over other British subjects in like cases. That section further provides that a law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void (a).

Concurrent power of legislation of the Governor General's and Local Legislative Councils how exercised in practice.

67. From the above it is clear that the Legislative Council of the Governor General has (as was to be expected) concurrent power to legislate for a Province under a local legislature. In practice, however, this power is not exercised, except in very extraordinary circumstances, as to matters within the competence of the local legislature. No precise boundary line is drawn between the subjects to be dealt with by the local and central legislatures. In practice, however, the Governor General's Council confines itself to legislation which is either for Provinces with no local legislature or is beyond the powers of a local legislature, or requires to be dealt with on uniform principles throughout British India (b). No legislation can however be officially introduced into the local legislatures without having been examined by the Government of India, so that the provisions requiring the previous assent of the Governor General for certain classes of measures seem, in practical operation, to be almost superfluous (c). With this is to be considered the fact previously noticed that no bill of any importance can be put before the Legislative Council of the Governor General by the Government of India without previous reference to the Secretary of State for India (d). Taken along with the provisions which

Essentially subordinate position of Indian Legislatures.

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(a) Cf. sec. 5 of the Colonial Laws Validity Act of 1865.

(b) In the proposals for reform contained in the Joint Report to Parliament by the Secretary of State for India and the Governor-General, concurrent power of legislation in matters provincial is to be retained by the Government of India, but will, it is expected, be very sparingly used. See para 212 of the Report.

(c) These restrictions can of course be effectually used when measures covered by them are introduced by non-official members.

(d) In para 191 of the Report on Indian Constitutional Reform recently submitted to Parliament by the Secretary of State and Governor-General it is

give the heads of Provincial Administrations, in regard to Provincial legislation, and the Governor General and the Secretary of State, in all cases, power to withhold their assent to or disallow Acts which have been passed by the Indian Legislatures, these facts fully establish the essentially subordinate position of the Legislative Councils of India (a).

68. The fact of their subordination being admitted (b), these legislatures, like those of other British colonies, are "not in any sense agents or delegates of the Imperial Parliament", but have and were intended to have, within the prescribed limits, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must determine that question, and the only way in which they can properly do so is by looking to the terms of the instrument, by which affirmatively the

Though as to legal competence sovereign within their spheres.

observed: "The partial control of the executive in the Provinces by the legislature and the increasing influence of the legislature upon the executive in the Government of India will make it necessary that the superior control over all governments in India which is now exercised by the authorities at Home must be in a corresponding measure be abated.

(a) See Decentralisation Commission's Report, pp. 10, 15.

(b) On the 20th August 1917, the British Cabinet through the Secretary of State for India announced in Parliament the future policy of the British Government with regard to the Government of India, as being "that of the increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India, as an integral part of the British Empire." To give early effect to this policy, the British Government deputed the Secretary of State, Mr. Montague, to India to study the question of Indian constitutional reform on the spot in association with the Viceroy, Lord Chelmsford. The Joint Report on Indian Constitutional Reform submitted by Mr. Montague and Lord Chelmsford was published in June 1918, shortly after the completion of these Lectures. The proposals embodied in the Report, if adopted, will set up within the existing Provincial Governments a small sphere of autonomy to start with, those Governments otherwise remaining subject as at present to the Government of India and the Secretary of State. The Provincial legislative bodies will be made predominantly elective, and will control the specified subjects made over to them through Ministers responsible to them. As a result, however, of periodical Parliamentary enquiries, this sphere of autonomy will, it is expected, be progressively increased, in proportion as the legislative bodies and the Ministers responsible to them will demonstrate their fitness for the exercise of larger Parliamentary powers—until finally the goal of the policy announced on the 20th August 1918 will have been reached.

legislative powers were created and by which negatively they are restricted. If what has been done is legislation within the general scope of the affirmative words which give power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions" (a).

## LECTURE X. ORGANISATION OF THE CENTRAL EXECUTIVE.

### (1).—*The Supreme Executive and Executive Council.*

Organisation of central executive in every country a product of history.

1. The organisation of the central executive of each country is so much the product of its history—though no doubt imitation also has played an important part—that any mere generalised account of the several existing forms of it, even if possible, would be of little value for purposes of comparative study.

Common starting point—an absolute King.

2. Looking at the matter, however, from the historical standpoint, all known forms of government (with unimportant exceptions) appear to have had a common starting point, viz : an absolute King. A variety of experiments has been tried with this highly effective instrument of social organisation in different countries and at different times. The necessity of imposing some kind of control over the unfettered despotism of the King appears to have been realised from the earliest times. The two forms which appear to have found most favour among the Ancients were—(i) providing him with a council, (ii) associating with him one or more colleagues; and were not rarely found operating together. This was so at least in both Rome and Sparta. The council again might be (i) advisory or (ii) controlling. It is very unlikely that

Beginning of councils.

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(a) Per Lord Selborne in *The Queen v. Burah*, (1878) 3 App. Cas. 889 P. C. See as regards the powers of Colonial legislatures, *Powell v. Apollo Candle Company*, (1885) 10 App. Cas. 282 P. C.; *Musgrave v. Chun Teeong Toy*, (1891) A. C. 272; *Hodge v. R.*, (1883) 9 App. Cas. 117 P. C.; *Phillips v. Eyre*, (1870) L. R. 6 Q. B. 1, per Willes J. at p. 20; and *Jenkyns, British Rule and Jurisdiction Beyond the Seas*, p. 16.

any precise notions about its functions would exist in the minds of people in the beginning. Whether it would be advisory or controlling would really depend upon what it succeeded in making itself to be in the struggle with the Royal power of which ample evidence is recorded in history. The Senate of Rome appears to have been passing from the advisory to the controlling stage when the Principate intervened and re-established absolute monarchy under an additional sanction (*e. g.* the popular) of which I shall presently speak, whilst the Ephors of Sparta made themselves the masters of Kings.

Struggle for power between King and Council.

3. The history of the evolution of central power in Greece and Rome would have been much less complicated if it had not been for another power which put forward claims to sovereignty from very early times, *viz.*, the "People". Of the narrow interpretations put on this term in ancient Greece I have already spoken. But it may be said without serious risk of error that the struggle for power in ancient Greece and Rome was really waged between the one, the few and the "many". In Athens the "many" won it so completely that the others disappeared. The "many" appointed officials, examined their accounts, sat in the law courts, made war and peace and ruled an empire. The multiplicity of interests under their control led to a division of administrative business in Athens, as it did later on in monarchies, into departments, and the development of a mild variety of bureaucracy of which an account was given in a previous lecture. It was a government (the only successful one in history) by citizens in meeting assembled deciding most questions by majority votes—an impossible form of government in modern conditions (a).

A third competitor, the People.

The rule of the "many" in Athens.

Impossible of reproduction in modern States.

4. Of the government of Republican Rome, I need only recall what I have previously said. The Royal power was first divided between two Consuls, each of whom could veto the other's acts. There were further divisions of power, functional as well as horizontal, without any single controlling

Organisation or rather want of it in Republican Rome.

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(a) I cannot help sharing Mr. Elihu Root's aversion for certain modern experiments in this direction, *viz.*, the Initiative, the Compulsory Referendum, the Recall of officers by vote of the electors and the Popular Review of judicial decisions. These in modern conditions cannot but lead to tyranny on the part of casual majorities over temporarily unpopular minorities, amongst other evils. See Elihu Root's *Addresses on Government and Citizenship*, pp. 90-93.

authority. The government of Republican Rome was government by warring departments and worse still by opposing interests organised, as to one at least, as a State within the State—and was saved from anarchy only by the unconstitutional usurpation of the Senate.

Were there  
Executive  
Councils of  
the Em-  
perors?

5. For ancient governments organised at all on modern lines, one might go either to Imperial Rome or to India under the Maurya Emperors. Both were centrally controlled bureaucracies. The business of government in both forms was divided into departments. Were there executive councils, cabinets of the King? There assuredly were in India—advisory ones apparently—but the theory of imperial authority in Rome—that it was a plenary delegation of power made for all time to the Emperor by the sovereign people—made it difficult for such an institution to attain vitality in the Roman Empire. The Feudal and post-Feudal Kings had advisory councils which grew out of the main body of the King's larger feudal tenants and the servants of his household. King and Council also form the two static elements of the central governmental organisation in every modern country. In republican countries, the "Kings" have been replaced by periodically elected chiefs who, as did the Consuls in ancient Rome, exercise Royal power in but another name, that of the "President", but that is not a difference in substance. The important point to note is that the administration in nearly all modern countries (a) is, in appearance at least, single-headed. What differentiates the organisation of the Central Government for one country from the same organisation for another are the extent and character of the powers handed over to the executive for administrative purposes, the constitution of the council and the relations of the executive to the other organs of the State.

Advisory  
Councils of  
Feudal and  
post-Feudal  
Kings.

King (or Pre-  
sident) and  
Council com-  
mon elements  
of modern  
States.

Executive,  
almost every-  
where single-  
headed.

Switzerland  
but not Ger-  
man Empire,  
an exception.

6. Writers on political science deal at length with the relative merits of the single-headed and plural organisations of the central executive (b). Modern governments have solved the question by virtually abolishing the plural form which survives only in Switzerland, the conditions of which country are however so peculiar that no political experiment

(a) Switzerland is the only clear exception.

(b) See Garner's Introduction to Political Science, Ch. XVI.

which has succeeded only in that country can claim application for that reason to any other country. The German Emperor is no doubt often spoken of by even German writers as the agent of the Bundesrath, the Federal Council of the Empire, which is said to be its real executive. But this overlooks the dominating influence which the Emperor as King of Prussia is able to exercise in that Council (a). Whatever may be said of him from the point of view of legal theory, the German Emperor exercises more power in fact than the executive head of any other country.

7. Of greater importance is the fact which distinguishes all heads of governments to-day from the corresponding authorities in Imperial Rome and the Feudal and post-Feudal monarchies built upon the Imperial Roman model. They all exercise not absolute but "legal" powers. No question that the power they exercise are those conferred upon them by law can of course arise where, as in republics, they are powers which have been expressly conferred upon them by the constitution. But in States having hereditary executives, there is said to be a "large undefined residuary power" which goes by the name of "Royal prerogative." In England the prerogative has always been regarded as based on law. Its extent and scope have always been subject to examination and have been defined by courts of law. It is also now firmly established that the exercise of the Royal prerogative can be regulated and restricted by statute (b). The two most important prerogatives of which the Crown in England has been deprived by Parliament within fairly recent times are the right to establish and organise law courts and the power to issue articles of war for regulating the conduct of the forces in times of peace. In both military and judicial affairs, the influence of the executive now rests, in normal times at least, only on its power of appointment and dismissal (which last again it does not possess in the case of high judicial offices), its powers of

'Prerogative' powers really "legal" in origin.

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(a) Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 275-276.

(b) Halsbury, *Laws of England*, Vol. VI, p. 372. I use the word "Prerogative" in the sense in which Mr. Dicey uses it. See Anson, *Law and Custom of the Constitution*, Vol. II, pp. 1 to 6; Dicey, *Law of the Constitution*, 6th Edition, pp. 363-369.



direction in military affairs and on the exercise of the power of pardon in judicial affairs. In other countries the Chief Executive may possess powers which may not be interfered with by the ordinary legislature. But even these powers must be exercised within limits defined by the "constitution." The fact is that ever since Kings have ceased to be "the State," the tenure of Royal office can be made to rest only, as it often does in fact, upon a theory of legal grant of authority by the constitution. A government is constitutional only in name, if it does not recognise this fact (a). No doubt the transition of hereditary monarchies from the "absolute" to the "constitutional" form has been so gradual (or where it has been ushered in by a revolution of any sort, the makers of the revolution have had so little time to attend to theoretical considerations) that there are everywhere to-day grouped round the person of the monarch "survivals" of the old theory capable only of a historical explanation. But the central fact is beyond question, that the executive to-day from the Chief downward are as much bound by law as any subject. Large discretionary authority may still be vested in the executive, but even this must be derived from law. It is because in the interest of good government large—dangerously large—powers must be entrusted to the executive, that other forms of restraint, besides the judicial, that for instance which is furnished by executive councils and the political control of the legislature, assume importance.

Crown's  
powers in  
India constitutional and  
not despotic.

8. I presume the power of the British Crown is as much "constitutional" in India as in any other part of the British Empire. The matter would scarcely admit of any doubt, but for loose statements found in the writings of Anglo-Indian

(a) Such was the late Russian Government. On May 6, 1906, Tsar Nicholas II gave his people a constitution by which legislative power was handed over to the Emperor acting in concurrence with the Council of the Empire and the Duma, the latter representing the popular house which under the constitution was to be elected indirectly on a limited suffrage. Even so elected, the first Duma gave expression to views so much against the taste of the Ministry (which under the constitution was responsible to the Emperor and not to the Legislature) that new and far more reactionary electoral laws were promulgated by Imperial ukase and a new and more subservient Duma elected. To protests raised against these proceedings the Minister M. Stolypin replied that the Tsar was free to take away what he had freely given. See Article on Russia in the Encyclopedia Britannica, 11th Edition.

authors and publicists to the effect that "the Government of India has powers, rights and privileges derived, not from the English Crown, but from the Native Princes of India whose rule it has superseded" (a). The statement seems almost to suggest that the Government of India has sovereign powers independent of the Crown—a political heresy which was killed so long ago as 1772 by a resolution of the English House of Commons (b). I take it however to be but an infelicitous way of expressing that the Crown of Great Britain has those powers, rights and privileges with reference to India. So far as the 'private law' rights and privileges of the Native Princes are concerned, there is no difficulty under the constitutional law of England in holding that these passed from the Indian Princes to the British Crown (c). But the statement is simply ridiculous if it be intended to mean further that the unlimited and despotic prerogatives of the Moghul Sovereigns or any of the lesser potentates of India of the 18th century have passed to the British Crown for the benefit of the Government of India, and that the Viceroy of India (or is it the Governor General in Council?) is free, within the limits of what were formerly the territories of those Princes, to play the Grand Moghul in a manner in which English

Has the Government of India the despotic prerogatives of the Moghul Emperor or other Indian Princes?

(a) Sir Courtney Ilbert's *Government of India*, Second Edition, p. 177. No authority is given for this proposition but from the account of the impeachment of Warren Hastings it appears that in his defence the retired Governor General had laid claim to such a power. "If the sovereignty", he said, "of Benares as ceded to us by the Vizier has any right annexed to it and be not a mere empty word without meaning, those rights must be such as are held, countenanced and established by the law, custom and usage of the Moghul Empire, and not by the provision of any British Act of Parliament hitherto enacted". See *Burke's Speeches on the Impeachment of Warren Hastings*, Bohn's Library, Edn. of 1888, Vol. I, pp. 483 to 485. It is needless to say that this claim was not admitted and the passage in Ilbert's book is the only one I have found in any work of authority which does not merely quote from Ilbert, where the matter is put forward as an indubitable truth. Neither Sir George Chesney nor Sir John Strachey seems to have been conscious of its existence when they wrote their accounts of the Government of India.

(b) This resolution which I found in David O. Allen's "India, Ancient and Modern" (Boston, 1856), at p. 186, was in the following terms. "That all acquisitions made under the military force or treaty with foreign princes do of right belong to the State".

(c) *Bell v. Municipal Commissioners of the City of Madras*, I. L. R. 25 Mad. 457.

constitutional law would not permit him to act, say, with reference to the Andaman Islands. There is, I dare say, much less justification for any claim to exercise arbitrary powers in a land of ancient civilisation like India than was found to exist for instance in regard to Pondoland by the Judicial Committee of the Privy Council in its decision in *Sigcau v. Sigcau* (a).

Power of Parliament to regulate and cut down prerogative.

Power how far possessed by colonial legislatures.

By Indian legislatures.

9. But whatever may be the character or extent of the Crown's prerogative in the United Kingdom, in the British Colonies or in India, it is undoubtedly a principle of English constitutional law that it can be regulated, restricted and even taken away altogether, either expressly or by necessary implication, by statute of Parliament. How far the grant to certain colonies of a representative legislature with or without an executive responsible to that legislature, or the grant of a non-representative legislature to others without special reservations in favour of Royal prerogatives, confers similar authority to restrict the prerogative powers of the Crown to colonial legislatures is a debateable question (b). Even as regards the Self-governing colonies, Sir Henry Jenkyns has observed that there are some matters, e.g. the position of the Governor, which though arising wholly within the colony are beyond the power of the colonial legislature to affect, and that it is not altogether easy to draw the line which bounds the right of the colonial legislature to affect the exercise of the prerogative of the Crown (c). Some of the limitations, including the one mentioned by Sir Henry, can be obviously read in the Parliamentary statutes which embody grants of constitutions to the colonies. The Government of India Act of 1833 expressly reserved royal prerogatives as matters which the Legislative Council of the Governor General was not competent to affect by legislation. But the impracticable character of such a limitation led to the enactment in the Statute of 1853 of a clause now embodied in sec. 84 of the Government of India Act of 1915 which provides that

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(a) (1897) A. C. 238.

(b) *Theberge v. Landry* (1876) 2 App. Cas 102, 106 P.C. *Cushing v. Dupuy* (1880) 5 App. Cas. 409, 414, 419 P.C. *Re Wi Mutua's Will* (1908) A.C. 448 P.C.; contra *In the Matter of Amir Khan* 6 B.L.R. 392, per Norman J.

(c) *British Rule and Jurisdiction Beyond the Seas*, p. 76-77.

no law passed by an Indian legislature is to be deemed invalid because it affects the prerogative of the Crown. To deprive colonial legislatures of the power to affect the prerogative of the Crown is really to make it impossible for such legislatures to organise the executive administration in the smallest matters even with the assent of the colonial executive. Since, as previously shown, no law not approved by the executive government can pass through a non-self-governing colonial legislature and any law passed against its wishes may be vetoed, such a limitation on the powers of colonial legislatures seems calculated only to hamper the executive when it may feel disposed to organise any matter affecting the administration by legislation. As to self-governing colonies, since the laws passed by their legislatures are in theory laws made "by the Crown by and with the advice of the two houses," it follows that the legislatures of these colonies must have virtually unlimited freedom in organising the local administration irrespective of the manner in which the prerogative of the Crown may be affected thereby—subject, of course, to limitations implied in the grants by which they receive their constitutional charters, one of which, as already mentioned, is as regards the position of the Governor.

Such power absolutely necessary for good government in colonies.

10. The position therefore of the central executive in the British constitution is thus undoubtedly one of subordination to the legislature in the sense that the executive can only exercise such powers as may be granted to it by Parliament or suffered by it to be exercised by or in the name of the Crown. Having carefully studied the constitutions of the modern monarchies as collected in Mr. Dodd's compilation (a), I do not see that the position of the central executive in any of them is substantially different. In most of them, the power reserved in the King is expressly made subject to regulation by the legislature. But even where the executive is, in terms, declared to be independent of the legislature, if at the same time the power of supply (whether with or without the power of appropriation) is vested in the latter, the legislature will inevitably control the executive by legislation if by no more direct method. Speaking of the relations *inter se* of the three organs of the State, the

Executive subordinated to the legislature in other countries also.

Legislature bound to be the regulator of the administration in modern States.

executive, judiciary and the legislature, a recent writer on political science accurately sums up the situation at the present day as follows:—"In all governments, the legislative department is in fact the most powerful and the judiciary the weakest. The powers of the legislative department in most governments are not specifically enumerated, but are general and residuary in character; in short it is a sort of repository of all powers not conferred on the other departments. It possesses everywhere a large control over the organisation and activities of the other departments, through its power of supply and its power to create public offices and to provide for their support. It not only makes the laws that are to be interpreted by the judiciary and enforced by the executive, but lays down the rules and conditions in accordance with which the executive acts. The legislature is thus, in a sense, the regulator of the administration" (a). If in modern constitutional forms of government, administration is, as a rule, in accordance with law, it is the power of representative legislatures to control the action of the executive by means of legislation that has mainly contributed to this result.

Nevertheless concentration of large discretionary power in a central executive essential to good government.

11. But, as I have said, in the interest of good government, every legislature must be prepared to give large—even dangerously large—powers to the executive, and these powers to be effectively employed must in a large measure be concentrated in an organisation directed in the last resort by a single chief. What guarantees are there that these powers (i) will be exercised efficiently and (ii) will not be abused?

Problem of modern administration how to prevent misuse of these powers.

12. Enlightened self-interest has been the chief operative motive of good government in all autocracies, and whenever the complexities of government have increased beyond the capacity of a single ruler, the latter has always found it necessary to rely on the advice and assistance of others. Where the hereditary principle has taken root, a council becomes a necessary adjunct to monarchy so that the business of government may not suffer from the minority or incapacity of the existing incumbent (b). But whatever might be the origin of the

(a) Garner, *Introduction to Political Science*, p. 425. The remark cannot, of course, apply to non-representative legislative bodies which are really subordinate arms of the executive.

(b) Jenks, *History of Politics*, pp. 84-7.

institution, it is a fact that most absolute monarchies have been found associated with a consultative council which at different times and in different circumstances have not been content with exercising merely advisory functions. Such a council, however, by whatever name it may be known, whether as Council of State or as Privy Council, recedes into the background directly the executive becomes subordinated to a representative legislature. That such an institution does not cease to have its uses even after such a change appears from the continuance of the institution in several Continental countries where not only has the legislature become the predominant organ of the State but has succeeded in winning the right to appoint and dismiss at pleasure the Ministers of the State, *e. g.* in Holland, France, and several German States. In Prussia, the council's advice is utilized in the framing of bills which it is intended to submit to the legislature, and similarly unimportant service is performed by the council of the other German States. In France only, has the council been re-organised to suit the altered requirements of modern administration. It is recruited in part by the President's nomination either on his own responsibility or on the recommendations of the Ministers, the Vice-president of the Council and the Presidents of the different sections (five in number) into which the council is divided, and, as to the rest, as the result of a competitive examination. One section, the judicial, is the highest administrative court. The others constitute in four sections bodies of experts in political and administrative matters whose advice must, as a rule, be taken by the administration, but need not necessarily be followed. The questions submitted to the Council of State are almost altogether legal and political (a). The Council of State performs important legislative functions ; first, in regard to bills which may be submitted to it for advice by both the legislature and the executive ; and, secondly, in regard to administrative ordinances by which, according to constitutional practice, the general principles which only are laid down in statutes have to be

Utility of the advisory Councils even after control of executive has passed to a representative legislature.

Advisory councils in Germany.

The re-organised Council of State in France.

(a) Technical questions are submitted to other councils attached to each of the administrative departments—a practice which is also extensively followed in Germany, and is being adopted in increasing measures in other countries also.

What stands for private and local legislation in France is done by Council of State.

worked out in detail by the executive. The President also habitually refers to it all questions the decisions on which may be of value as precedents for future action in administrative matters. "Its advice is nearly always asked as to the exercise of the central control, which the executive authority possesses, over the actions of the localities and over the recognised religious denominations, as to the grant of charters and to many acts in the financial administration. Indeed, it may be said that what in England and America is done by means of special and local legislation is in France done by the decrees of the President or orders of the Ministers passed after hearing the advice of the Council of State" (a).

English Privy Council.

13. In England the Privy Council, as an executive council of the King, survives in name only, its functions having been appropriated by a new body dependent on the legislature and called the Cabinet, the character of which will be presently considered. But it is necessary to mention here that an institution adapted from the English Privy Council survives in the non-self-governing English colonies in their Governors' and Governors General's Executive Councils, and in the Executive Councils of the Governors in some of the American States (b). I have previously considered the relations between the Governors and Governors General in the British colonies and their councils and shown how the power of the former to overrule their councils at their discretion virtually reduces the Councils to much the same position as that of the Council of State or Council of Prefecture in France. In the American States the Governor's council controls, and not merely advises, in matters within its competence. In the Federal Government of the United States also and in some of the States, the Upper Chamber performs in certain matters the functions, not of an advisory, but of a controlling council. The Bundesrath, the Federal Council of the German Empire, which

Is the model of Governors' councils in British colonies, which are advisory.

Councils in United States though originally advisory have become controlling bodies.

The Bundesrath in Germany—its relations with the Emperor.

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(a) Goodnow, *Comparative Administrative Law*, Vol. I. pp. 111-12. There are Councils of State similarly organised in Holland (Arts 74-75 of the Constitution of Holland) and in Italy, Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 167, note 4

(b) The Montague-Chelmsford scheme of Indian constitutional reform proposes the establishment of an advisory Privy Council of Notables whom the Governor General may consult on questions of policy and administration. See the Report, para 287.

is its Upper Legislative Chamber, is also the Executive Council of the Empire, and but for the fact that the Emperor as King of Prussia has 17 out of the total of 58 votes, the German Emperor would have been, what many German writers claim him to be, the executive officer of the Bundesrath.

14. It remains to consider only the most modern variety of executive councils, viz: the Cabinet in a system of government controlled by a Parliamentary executive. The Cabinet-system of government which originated in England is widely believed to be the ultimate form of government in all countries where the legislature has succeeded, as it has in most modern governments, in making itself the controlling organ of the State. It spread little by little into Holland, France, Belgium, Roumania, Sweden, Norway, Denmark, and the British colonies, "until it has become the principal system of government in the world." It has made little headway in Germany, however, and none at all in Switzerland, North America, and but little in Latin America. In these countries, the executive is free to choose Ministers of any political persuasion and no exception may be taken to this by the legislature even when the Chief Executive himself has been returned to that position by the votes of a party. It will be remembered that even in England, the King was originally under no obligation to appoint as Ministers only such members of Parliament as could command a majority in the House of Commons, and even at the present day the obligation rests only on convention and not on any legal rule. The practical difficulty which Ministers, not possessing a majority in a house which completely controls the supply, found in administering the affairs of the country in opposition to the will of an obstructionist lower chamber led almost imperceptibly to a practice, which has now become the rule, of appointing Ministers from among the party which commands a majority in the House of Commons. It is true that in several of the British Crown colonies, there are representative legislatures side by side with Ministers responsible not to the legislatures but to the Home Government. It is also equally a fact that the Ministers and the legislative councils so circumstanced, are frequently found in conflict—a conflict which admits of solution only because backed by the authority of the Home Government the Ministers can always carry

Cabinet government, the necessary outcome of a government controlled by a representative legislature.

Its increasing prevalence.

Its unconscious evolution in England.

Non-self-governing Crown colonies with representative legislatures a recognised anomaly.



their point against the local legislatures. These conflicts are, however, admittedly so little to the advantage either of the Home Government or of the colonies (a), that they are tolerated, if at all, only on traditional or historical grounds, and a movement is clearly discernible in favour of giving them either full self-governing status or reducing them to the position of ordinary Crown colonies. The non-Parliamentary form of government of Germany and the United States also is widely viewed as a similar half-way house not indeed in the direction of absolute but of full Parliamentary government.

Government may be Parliamentary without being Cabinet government ; but this too a temporary phase.

Essentials of Cabinet government.

15. But this only explains the growth of the Parliamentary not of the Cabinet form of government. Each member may be only individually responsible to the Parliament and not all collectively, and there may not be among them any one able to control the action of the others and to appoint or dismiss them at pleasure. Wherever this is the case, it shows that the responsibility to Parliament has not been fully attained, being divided between the Parliament and the Chief Executive. The essence of the Cabinet form of government is to be found in two things : (i) the transference of the power of appointing and dismissing his colleagues from the Chief Executive to one among the Ministers whom the house or rather the electorate marks out as the leader of the party in power ; and (ii) the collective responsibility of the Cabinet for the policy of the Prime Minister. The latter necessarily follows from the former, for a Minister who dissents from a policy approved by the Prime Minister must either acquiesce and accept responsibility or resign.

Is a Cabinet Council advisory only ? Its relations with the Premier.

16. But whilst on the one hand the dominant position acquired by the Prime Minister leads to the collective responsibility of the Ministers, this latter and other circumstances connected with the tenure of the Prime Minister's office make the Prime Minister defer to the views of his principal followers with whose assistance more or less only can he maintain his hold on the house and on the electorate. The Cabinet in this way becomes much more than an advisory council of the Prime Minister, whilst falling short of a controlling council. The

(a) Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, p. 94.

Prime Minister of England is, for all his influence, not an autocrat—since he must as a rule persuade and lead (a).

17. The necessity which makes a Cabinet an executive council of the Premier also has this consequence that not all the Parliamentary heads of departments are entitled to find a place in it. Executive councils to be effective must not be too large, and in modern governments with their numerous and rapidly multiplying departments and heads who must be members of Parliament to answer for their proper administration in the house, many Ministers must be content to remain outside the Cabinet rank. The Cabinet of England had, it is true, been recently showing a tendency to undue expansion, with (as is generally believed) the consequence that a smaller Cabinet was growing within the larger. But the conditions of the War now in progress (b) has, temporarily at least, concentrated power in a smaller number of Ministers than had at any time constituted a regular British Cabinet (c).

Not all Ministers entitled to Cabinet rank.

18. Another characteristic of English Cabinet government which also has developed gradually and has been extensively copied in other systems is that the Cabinet (leaving out some few members without portfolios who are inducted into it for their experience or because from party considerations they cannot safely be left out) must be composed of the heads of the

But Cabinet Ministers must be heads of the important departments of State, to secure Parliamentary control over them.

(a) The practice of the British Cabinet until very recently had been not to keep any minutes of its proceedings. The present War Cabinet, composed as it is (with one exception) of members who have been relieved of the work of administering departments, has to keep minutes of the discussions for communication to Ministers in charge of the departments concerned and to other persons whom it may require to carry out its directions. See the War Cabinet's Report for 1917.

(b) As these pages are being seen through the Press, the armistice of 11th November, 1918, has already brought the War to an end.

(c) Lowell, Government of England, Vol. I, pp. 72-73. This "War Cabinet," in its Report for the year 1917 published in March last, thus describes its own functions: The system of the War Cabinet distinguishes between the body which is responsible for the supreme direction of the War and the Ministers who have charge of the great administrative departments of State. The general direction of the policy of His Majesty's government during the War rests with the War Cabinet, whose members, with one exception (viz. of the Chancellor of the Exchequer), are relieved of the day to day preoccupation of administrative work and whose time is, therefore, entirely available for initiating policy or for the work of co-ordinating the great departments of State.

Collective  
responsi-  
bility.

most important departments of government. It is this only which can enable Parliament to control the administration of these departments, whilst, as the heads of the other departments also stand or fall with the Premier, the latter and the Cabinet as a whole have to accept responsibility for the administration of these departments as well (a).

Its general  
effect.

19. It can never be repeated too often, however, that the "Cabinet government" is not "collegiate government." Each Minister is left in sole charge of his own department with its attendant responsibilities. The Prime Minister "can do no more than keep a watchful eye on those departments which are concerned with matters of current importance and trust to the discretion and loyalty of his colleagues in other departments to take no important step without consulting him". The Prime Minister communicates the result of every cabinet meeting to the King and is intermediary between the Cabinet and the Crown, but every Minister who is head of a department is entitled to state his business directly to the King. The Prime Minister would not allow business peculiar to the department of one of his colleagues to be first submitted to himself, nor would he allow one Minister to interfere in the department of another. No loyal colleague would, in his communications with the Sovereign, discuss matters of novelty or importance which had not been previously discussed with the Prime Minister, or, if necessary, with the Cabinet as a whole" (b). The English Cabinet in fact goes as far as in the circumstances is possible in the direction of reconciling individual with collective responsibility, the concentration of power and responsibility in the hands of a single chief with the duty of seeking the counsel of his most influential followers, and in that way acting, as far as is humanly possible, in conso-

(a) This collective responsibility does not however absolutely preclude the repudiation of particular acts or decisions of an individual minister done or arrived at on his own responsibility and without consulting the Premier or the appropriate Cabinet Committee in circumstances in which it was his obvious duty to do so and the resignation in consequence of the particular Minister only.

(b) Anson, *The Law and Custom of the Constitution*, Vol. II, 3rd Edition, p. 121. Consult upon the present topic generally Ch. II, Subsec. 3, of this book; Dicey, *Law of the Constitution*, 6th Edn., Note, III, on the Distinction between a Parliamentary Executive and a non-Parliamentary Executive, pp. 428-438 and Lowell's *Government of England*, Vol. I, Chs. I to III.

nance with the probable or expressed views of the majority of the people's representatives and with the mandates of the electorate.

20. It would not be correct to say that the Cabinet form of government wherever introduced has developed all the above characteristics of the English Cabinet. Belgium has probably approached nearest to it. In France and Italy, the Cabinets are never homogenous bodies as in England, the reason being that the members of the houses in both the former countries do not as in England fall into one of two broadly divided parties, but form different groups holding radically different views, so that no single party with a policy of its own can command the confidence of the house. The Cabinets are therefore almost invariably coalition Cabinets, habitually weak and unstable—a circumstance which in Italy has furnished the King opportunities to dictate who should be the Ministers, with the consequence that the Cabinet government of Italy is really a very different thing from its English prototype (a).

Its imperfect realisation in other countries except Belgium.

21. So far as one can see at present, Cabinet government is the only possible form of government of the future in every country, however it may need to be modified to suit the special conditions of particular countries. It and the effort to attain it (and therein lies its best claim to permanence) furnish the most exacting school of political training to a nation. One need not be surprised therefore to find that political consciousness in every country outside England is striving either to attain it or having got hold of its outward semblance is seeking to adapt the life-movements of the government to it.

Cabinet form of government the goal of all constitutional governments.

22. A question of considerable importance arises in connection with the Cabinet form of government, and that is, what is or may be regarded to be the position of the Chief Executive in a fully developed government of this type. Do the King in England and the President of France lag superfluous on their respective political stages? With regard to the King of England, this can hardly be said to be the case. The King is the permanent, and the Prime Minister the political chief of the United Kingdom. An acute American

Relations of the King and the Premier in England.

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(a) See Lowell's *Governments and Parties in Continental Europe*, Vol. I, pp 28-30, 127-129, 152-154; Garner's *Introduction to Political Science*, pp. 184-187.

King, the permanent, and Premier, the political, chief of the United Kingdom.

writer has pointed out how the combining of the lay and professional elements for each service runs through the entire administrative machinery of the country (a). The jury and the judge, the Justice of the Peace and his clerk, the Minister and the permanent Under-Secretary, the Borough and County Councils and their clerks, all show this combination in different situations. In the lower services the professional element naturally occupies the lower place in point of dignity in a country which is thoroughly averse to bureaucratic domination. But the position is without objection reversed in the case of the judge and most conspicuously in the case of the King. "Ministers come and go, and the policy of one group of Ministers may not be the policy of the next, but all Ministers in turn must explain their policy to the Executive Sovereign, must effect it through his instrumentality, must leave upon his mind such a recollection of its method and of its result as may be used to inform and influence the action of their successors. It is true that our Kings and Queens can no longer exercise at their pleasure the executive powers of the State, nor enjoy a perfectly free choice of the Ministers who are to exercise those powers. They still remain the instrument without whose intervention Ministers cannot act ; they still remain advisers who have enjoyed unusual opportunities for acquiring the knowledge which makes advice valuable, who may be possessed of more than ordinary experience, whose warnings must be listened to with more than ordinary courtesy" (b). The same can hardly be said of the President of France, though no doubt even a Chief Executive with a tenure which is fixed for a certain number of years will give some stability to a form of government which must from its very nature be wanting in continuity, since a constant change of Ministers is the very life-breath of this form of government. Failing a permanent hereditary King, a representative of such a King holding office

Why an elected President cannot fill the position as effectively.

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(a) A. Lawrence Lowell, *Government of England*, Vol. I, Ch. VIII. Mr. Lowell himself fails to see this particular application of the principle. He seems rather to accept Bagehot's reading of the constitutional position of the English Crown and lays greater stress on its being "a social and moral force, a pageant and a symbol" than on the real influence which, on account of its permanence as compared with the fleeting existence of Cabinets, the Crown is able to exert on the administration. *Ibid.*, Vol. I, Ch. II.

(b) Anson, *Law and Custom of the Constitution*, Vol. II, part I, 3rd Edition, p. 49.

as Viceroy for a term of years, makes perhaps a better substitute than an elected President. The reasons which I have just urged in favour of a hereditary monarch being considered the best support of a Cabinet government may undoubtedly suggest the advisability of appointing Governors and Governors General and Presidents of republics for very long terms or for life. But, as no private person can possibly gather round him the prestige and dignity of a hereditary monarch, it is not likely that such an extension of the terms of the President's or the Governor General's or the Governor's offices will be seriously advocated in France or in the Self-governing colonies of the British Empire.

Nora Viceroy, unless term indefinitely extended

Why term cannot be extended.

23. I have previously noted the fact that Cabinet government is gradually extending in every modern State and I have ventured the opinion that it is the only possible form of government of the future for any country. It is only right that I should state my reasons for this opinion. If all power of government must in the interest of good government be centred in a single person, and if the same consideration must also result in the latter being made personally irresponsible (a), somebody must be found to accept responsibility for the lawful exercise of those powers, if the course of orderly government is to be saved from being overtaken, whenever there happens to be a bad or a weak King, by violent convulsions involving the whole realm; and no person of course will undertake responsibility for an act not his own and which he is not free to perform or not according to his own judgment and in his own way. All modern constitutions, almost without exception, now require that every act of the executive must be countersigned by a Minister who will be answerable for *its legality* in the courts of law. Such a provision cannot of course lead to Parliamentary form of government in its true sense, for the Ministers still remain responsible to the Chief Executive and not to Parliament for their *policy*, that is to say, for the manner in which they are going to use the large discretionary powers with which the executive is entrusted for purposes of government. The executive in such governments take their law from the legislature but not

Cabinet government the only possible form of government consistent with the rule of law in a single-headed administration with legally irresponsible chief.

First step legal responsibility of ministers.

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(a) This matter will receive elucidation when the legal position of the Chief Executive will come to be considered. Lecture XIV *infra*, para 2.

Responsibility for policy to law-making body necessarily follows.

their policy. But a legislature which can give the law to the executive will not be long in demanding that the latter should exercise discretionary authority also, not merely within the bounds of law, but in accordance with its wishes. It is inevitable, therefore, in all those countries in which (the Chief Executive being legally irresponsible) legal responsibility is accepted by Ministers, that the Chief Executive should also in course of time be relieved of responsibility for the latter's policy and that the Ministers should become responsible for it directly to the legislature and not to the Chief Executive. The governments of the United States and Germany, in which the Ministers are still responsible to the President and the German Emperor respectively, I have on this account not hesitated to describe as in the nature of half-way houses on the way towards fully responsible Parliamentary government (a).

Appreciation of the American non-cabinet government.

24. I feel however that I would be doing singular injustice to the United States government, both Federal and State, if I did not specially draw attention to the points which tell in their favour, when compared with the German Imperial government. The Chief Executive in the Federal and State governments of the United States, being themselves elected magistrates, holding office for short terms, are naturally more responsive to the views and opinions of the politically conscious elements in the States than the German Emperor is likely to be to public opinion in Germany. The Ministers who control the departments in America are thus through their elective masters responsible to the same electorates which return the legislatures. In the State governments of America, it is indeed not unusual to find Governors repeatedly vetoing legislation with the approval of the electorate. It is unfortunately the case in the State governments of America that only professional politicians of a lower moral calibre than the majority of the electorate can be found willing to stand for seats in State legislatures, and this makes it possible for interested

(a) See on this point Lowell, *Government of England*, Vol. I, Ch. II, pp. 27-31. The constitution of Denmark makes the Ministers responsible to both the King and the legislature—with the result that each of these powers has sought to hold them responsible to itself rather than to the other—and though for a long time the King was able to hold his own against the legislature, recent events show that it is the King and not the legislature which must surrender in the end. See Ogg, *Governments of Europe*, Title, Denmark.

persons to put legislative proposals through the assemblies of a very questionable type so easily as actually to have engendered a general distrust in the legislative methods of these bodies. To such lengths has this process gone in some places that Governors seeking re-election have been known to rely on the number of instances in which they have killed legislative measures by their veto as peculiarly qualifying them for the position (a).

25. It seems to follow from the above that an elective Chief Magistracy, though an element of weakness as compared with its hereditary prototype in a Cabinet form of Government, may actually lend strength to a non-Cabinet form of administration. This circumstance leads me to believe that (unless of course the Germans should establish a republic) (b) Cabinet government will be longer in coming in America than in Germany. This possible stability of "Presidential Government" in America makes a closer examination of this system necessary even if it should (as I believe it does) represent but a temporary phase in constitutional evolution.

Non-cabinet government more compatible with an elected than a hereditary chiefship.

26. The key to this form of government is not unnaturally to be found in history. At the time the liberated American colonies set themselves to fashion their respective constitutions, and shortly afterwards that of the Union, the Cabinet form of government did not exist at least in the consciousness of people either in the colonies or in England. In 1763, King George III believed, and his subjects whether in the British Isles or in the colonies believed with him, that Ministers were responsible for their *policy* to the King and to nobody else (c). Meanwhile the thirteen colonies of America

Origin of the American form of government; why it is non-Cabinet.

(a) Bryce, *American Commonwealth*, Chs. XLIV-XLVI. The fact that the legislatures in the States are under the existing system free to interfere with the administration by methods of legislation, whilst they cannot be held accountable for the consequence of such legislation in the day to day administration of government, naturally breeds a spirit of irresponsibility—the only remedy for which can be found in a strictly Cabinet form of government. The establishment of such a form of government will on the other hand attract a better class of members to whom Cabinet offices will offer a greater inducement than the position of mere legislators.

(b) A surmise which the end of the War seems about to see fulfilled.

(c) Instead of appointing Ministers who commanded a majority in a freely elected house. King George chose Ministers who would act according



Origin of  
State govern-  
ments, with  
their weak  
executive.

had developed a local life which made them little disposed to accept the policy which the King's representatives sought to enforce under the direction of the Home Government. The colonists vigorously resisted and for that purpose used to the fullest extent their Council's control over supply and appropriation, with the result that the local administrations were reduced to impotence and depended for what powers they exercised on the sufferance of the local assemblies. "The history of the years from 1680 to 1763 is a chronicle of continual defeat for Governors who were obliged to see one power after another wrenched away from them" (a) by the assemblies. The compromise reached in England, and which consisted in the transfer, virtually intact, of all executive authority to an informal committee of the leaders of a freely elected assembly (b), had no opportunity to materialise in the American colonies. The assembly had denuded the administration of all authority when the revolution came, and its immediate result (by making the office of the Governor elective) was certainly not to strengthen the executive arm. The assemblies have on the whole remained masters of the administration. They establish departments and offices, lay down in detail the duties of officials and the manner in which they are to be performed and even participate in the appointment and removal of officials. The State legislatures have acted with such thoroughness in this matter that the Governor of a State can now be called the "head of the administration," only by way of a polite euphemism. The only power of consequence which (once nearly lost) the Governors have now been allowed to recover is the veto over legislation. It is therefore hardly to be wondered at that the vigour with which the veto has been exercised should figure prominently in some re-election programmes

to his biddings, and undertook by political corruption to find a house which would support them in carrying out his biddings—a very subtle perversion of Parliamentary government. King George in fact bribed where the Tudor Kings bullied Parliament.

(a) T. C. Smith, *Wars Between England and America*, pp. 16-17.

(b) The executive authority in England, according to Lowell, is far wider than that of the Chief Magistrate in many countries and well-nigh as extensive as that now possessed by the monarch in any government, not an absolute despotism. See *Government of England*, Vol. 1, p. 23.

of outgoing Governors. And, as I have previously shown, there is room in the States for the exercise of this power.

27. What would have been the fate of the thirteen colonies, governed as they were by legislatures which could not be found to agree to some measure even for liquidating the debts of the War of Independence, if the leaders of that war had not contrived to wheedle the population into setting up, over the heads of the State governments, a national Federal government, may be conjectured. Certain national interests of supreme importance which experience had shown could not be left to the State legislatures were handed over to the Federal government. But the Federal government itself was modelled on the framework of the colonial governments (a): a legislative assembly of two houses and a President elected for a term, who was to have just such powers as were possessed by the Governor of a State, e.g. military command, diplomatic power, limited veto power, the power of pardon, power to call extra sessions of the Congress, to adjourn it in case of difference between the houses and the power to send a message. These had little to do with the internal administration, as to which he was given power only to nominate and, by and with the advice and consent of the Senate, to appoint to certain specified high offices, the appointments to which "were not otherwise provided for and which shall be established by law." The President however has been saved from the predicament of the Governors by the wisdom of the Congress which by interpretation or legislation has recognised in or made over to the President large powers of appointment, removal and direction and has thus helped to make him in fact the head of the national administration. The United States Federal government has thus evolved out of extremely unpropitious beginnings a strong executive (b), the Chief of which is kept *en rapport* with public opinion, not as in England by the necessity of appointing Ministers from amongst the leaders of the party which commands a majority in the House of Representatives, but by the fact of his being himself elected at the end of every four years. At the time the Federal government was established, the idea

Political salvation of the States due to creation of a national Federal government.

Which originally impotent, has wisely been suffered to be strong.

The Chief Executive is responsible to the people through his election though not to the legislature similarly elected.

(a) Goodnow, *Comparative Administrative Law*, Vol. I, p. 62.

(b) Goodnow, *Comparative Administrative Law*, Vol. I, pp. 64-70.

the people of America entertained was the idea of the English Parliament in 1700, that no person who held an office or place of profit under the executive should be capable of serving as a legislator. No objection was felt to Ministers being, what they were assumed to be in every country, nominees of the executive, rather than of the legislature, though (not to make the President too independent) the assent of one house, the Senate, was required to be taken. The legislature was to be made independent of the executive, and the Chief Executive was not to have the power, which King George III had used with fatal effect, of buying a following in the legislature by gift of patronage.

28. Public men in America are now beginning to see that this dissociation of the executive from the legislature has really weakened the former notwithstanding its large powers (which it virtually enjoys on the sufferance of the legislature) since Ministers cannot attend meetings of the legislature and address, guide and lead the members, as they are able to do in England, in legislation and other matters. In many Continental States of Europe and in Japan, where the Ministers are not necessarily members of the legislature, the defect has been sought to be partially remedied by allowing them in all cases to address the legislature (a).

29. Upon the question of the constitution of the State governments of America, it is worth while observing that but for the effective protection afforded by the strong Federal government, the State legislatures would not have found the freedom they have had to develop the idiosyncrasies they inherited from the colonial epoch to the end that they have succeeded in "so dividing and transferring the executive power within the States as to change their governments into a parliamentary despotism with a nominal executive chief utterly powerless" to do either good or evil (b).

But for the protection of the Federal government, State governments would probably have had to develop a strong executive.

(a) As to Japan, see Art 55 of the Constitution of 1889. As to Holland, Denmark, Spain, Portugal and Germany, see Ogg's Governments of Europe.

(b) The portion within inverted commas is an adaptation from an opinion of Attorney-General Cushing quoted in Goodnow's Comparative Administrative Law, Vol. I, p. 68. The consequence is perhaps inevitable wherever a weak administration is pitted against a strong representative legislature which whilst not holding itself responsible for the day to day administration of the affairs of the nation yet freely interferes with it by way of legislation. It is

30. Paradoxical as it may appear, the peculiarities of the American Federal and State organisations are best brought out by contrasting them with the organisation of American colonial governments. Looking at it from outside, the organisation of the American colonies appears to be a close copy of that of the Home Federal administration. The Chief Executive is a Governor not responsible to the local legislature which is bicameral, both houses being elective. But the Governor is not elected but appointed by the President by and with the advice of the United States Senate, and so generally are most of the important officials and judges, the others being appointed by the Governor. There are local differences between, for instance, "fully organised territories" like Hawaii and Alaska and "partly organised territories" like Porto Rico and the Philippine Islands ; but the general features are as I have stated. The fact that the Governor is a person appointed from Washington and so necessarily pledged to carry out the policy of the Home Government, whilst the legislature which makes laws and votes supplies is freely elected by the people of the localities, makes the administration of the colonies fundamentally different in character from the Home administration. In fact the United States colonial administration is in its essential features similar to that of non-self-governing British colonies possessing representative legislatures. To prevent deadlocks inseparable from such an arrangement, it is generally provided (as in the constitutions of the British Crown colonies to which they bear the nearest resemblance) that Colonial laws may be vetoed by the Governor and, if passed over his veto, by the President and finally by the Congress (*e. g.* in the constitution of the Philippine Islands as amended in 1916). Acts of Congress moreover may and often do impose important limitations on the legislative power of colonial legislatures. The powers of the Hawaiian legislature has it seems been progressively crippled in this manner. Finally, it is usual to provide that in case the legislature should fail to pass appropriation bills to pay the necessary expenses of carrying on the government and meeting its obligations, the

Character of  
American  
colonial ad-  
ministration.

Resemblance  
to British  
Crown colony  
government  
with repre-  
sentative  
legislature.

only where through a cabinet of its own leaders it obtains administrative control over the executive that it ceases to interfere in the details of administration by way of legislation.

treasurer may with the approval of the Governor, make such payments, for which purpose the sums appropriated in the last appropriation bill is to be deemed to have been re-appropriated. The "territories" become fully self-governing in the American sense when being raised to the status of States they require the privilege of electing their own Governors. By the Act of 1916, the United States Congress is pledged to grant to the Philippines independence and not the status simply of a State within the Union as soon as a stable government should have been established in those islands (a).

Final phase of such governments States within the Union.

Promise of independence to the Philippine Islands.

## LECTURE XI. THE ORGANISATION OF THE CENTRAL EXECUTIVE (Contd.)

### (II)—*Organisation of Departments.*

Organisation of departments determined by nature and kinds of work to be performed.

1. The next element in the organisation of the central government which needs consideration is the manner in which that government arranges to perform its functions, the organisation in other words of its departments and offices. But this depends so entirely on the nature and the kinds of work the central administration is called upon to perform that no adequate idea of it can be conveyed without a preliminary examination of the powers and duties of the executive.

Varieties of work of the central executive.

2. The executive power has been classified in a recent work on political science under the following heads :—

(i) That which relates to the conduct of foreign relations and which may be called the Diplomatic power.

(ii) That which has to do with the execution of the laws and the administration of the government. This may be denominated the Administrative power (a).

(iii) That which relates to the conduct of war and which may be described as the Military power.

(iv) The power to grant pardons to persons charged with and convicted of crime ; this may be called the Judicial power of the executive.

(a) See Garner, *Government in the United States*, 1917, Ch. XIX.

(v) That which relates to legislation, or the Legislative power (b).

3. French authors designate all these groups of powers other than group (ii) as Political powers. These all embrace powers in the exercise of which the executive is as a rule more unfettered by extrinsic control than when exercising administrative powers, in respect of which it has to pay the greatest amount of regard to the wishes of the legislature.

4. The last of the above groups of powers is soon disposed of. The executive in all countries have certain powers, at one time very real but now tending to be all but formal, (i) of summoning, opening and dissolving legislative chambers. There are again various ways, more or less effective, in which the executive may (ii) initiate legislation, the introduction of taxing measures in particular being now universally in the hands of the executive. The Parliamentary form of government and forms which, though not Parliamentary, permit Ministers to sit and speak in legislative chambers, with or without the right to vote, offer greater facilities in this latter respect than the Presidential form. There also exists in all countries in varying degrees of effectiveness a power in the executive (iii) to check legislation which may have been passed hastily or as the result of momentary passion or in a spirit of party faction, or which may tend unduly to encroach upon the legitimate powers of the executive (c). In defence of the power to veto legislation which may tend unduly to trench upon the powers of the executive, it has been said that "reason and experience teach that the powers of neither department ought to be dependent upon the will of the others,

Legislative power.

The veto.

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(a) The organisation of law courts where it has not been taken away by the legislature and the appointment, transfer and dismissal of judges so far as these powers rest in the executive would come under this head and not head no. (iv). But for convenience of treatment this subject will not be discussed in the present connection. It will be dealt with under other topics, viz: Legal Relations of the Judiciary, and Judicial Control of the Administration, Lectures XVI and XXIII *infra*.

(b) Garner, Introduction to Political Science, pp. 547-48.

(c) The new republican constitution of Portugal has refused to confer the veto power on the President. This provision seems to be a step in advance of the rule in England, where the Royal veto though never used for more than two centuries cannot be said to be quite dead.

Its utility in countries where there is much class antagonism.

but each ought to possess a constitutional and effectual power of self-defence against the encroachments of the rest" (a). Nevertheless, consistently with the position of pre-eminence which representative legislatures have won in modern States, the veto where it has not actually fallen into desuetude—as it tends to do in Parliamentary governments where the executive are nominees of the legislature—is expected to be used in effect only as an appeal to the legislature itself in order to induce it to reconsider its own decision. In countries where class differences exist in an acute form, the veto of an impartial executive may be absolutely indispensable in the interest of good government as the history of Crown colony legislation in English and French Crown colonies possessing legislatures which are representative only of a privileged minority has shown. In Germany where also class differences are acutely prevalent, though the German Emperor has not been given by the constitution a veto over legislation which has passed both the Reichstag and the Bundesrath, the power which the Emperor has to withhold promulgation on the ground that the statute is unconstitutional has been interpreted as virtually clothing him with the power of veto. If, as is generally believed, the courts of law cannot recognise the validity of laws wrongly withheld from promulgation, the veto is not merely a "qualified negative" but an absolute over-ruling veto (b).

Diplomatic powers.

Participation by a chamber of or whole legislature.

5. As regards what has been called the diplomatic power, in most States, whilst the executive is allowed the greatest freedom in negotiating treaties and other international agreements with foreign States, power to ratify them is generally reserved in favour of one branch at least of the legislature. In Great Britain however the executive is both the negotiating and ratifying authority. In all countries, where such treaties or agreements affect matters within the competence of the legislature, and specially when they stipulate for appropriation of money, the legislature takes an indirect part in treaty-making. In all States the executive is vested with the power of appointing and receiving diplomatic represent-

(a) Garner, *Introduction to Political Science*, p. 565.

(b) Lowell, *Governments and Parties in Continental Europe*, Vol. II, pp. 61-62, and Garner's *Introduction to Political Science*, pp. 567-568.

atives and of representing the State in all international relations.

6. "In the military organisation of the State, dualism is out of place." In the organisation and disposition of the forces, specially in times of war, the executive must always remain the supreme authority. But the legislature exercises an effective check on the military as on every other power of the executive which depends for its exercise upon supply. As no war can be waged without extraordinary taxes and credit, the executive has always to see that it carries with it not merely the legislature but the nation as a whole, in at least its offensive wars. In the United States, the President cannot declare war without the assent of the Congress. In Germany the assent of the Bundersrath is necessary and in France that of both Chambers. No such limitation is imposed by law on the executive in Great Britain, but there is really little difference in practice.

Military power.

Influence of legislature.

7. "War always brings a vast addition to the power of the executive and enables him to take on something of the character of a dictator." The Common law of England permits this enhancement of prerogative to take place automatically and without the intervention of the legislature provided a "state of war" exists. Whether a "state of war" did in fact exist or not in any case is, in English law, a matter for the law courts. In Continental countries, however, the executive has authority to suspend the ordinary processes of law by declaring a "state of siege," of the existence of which the executive is the sole and final judge (a), and this is

"State of siege."

(a). See Dicey, *Law of the Constitution*, 6th Edn, Ch. VIII, pp. 282-290 and Note XII, pp. 502-519. In France, a "state of siege" can be proclaimed normally by statute, and by the President when the legislature is not in session, subject to the provision that in such a case the Chambers shall meet as of right in two days. See Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 63-64. The constitution of Japan, which in many respects reduces the traditional Continental methods of administration into a system, provides by Art 14 that the Emperor proclaims a state of siege, the conditions and effects of which shall be determined by law. Art 187 of the Netherlands constitution is to the same effect. The German Emperor is free to declare *martial law* in any part of the Empire. The three South American republics i. e., of Chile, Brazil and the Argentine Republic, seem grudgingly to give their Presidents certain emergency powers of declaring a state of siege, with authority only to arrest and remove persons. See Dodd's *Modern Constitutions*.



the practice which on the outbreak of the Great Mutiny in 1857 was deliberately adopted in India by Act XI of 1857.

Judicial  
power—power  
of pardon.

8. The power of pardon exercisable *after* conviction finds justification in the fact that no system for the administration of justice is or can be free from imperfections and not all the circumstances of extenuation may be brought within the knowledge of the courts of law. This power is by common consent regarded as a natural and necessary part of the executive power and in England survived the abolition of the Crown's suspending and dispensing powers by the Bill of Rights in 1688. It is a power which Governors and Governors General in British Colonies are invariably authorised to exercise. In the United States, the President may exercise this power even *before* conviction.

Administra-  
tive powers.

9. The administrative power of the executive resolves itself into (i) the power to organise departments and offices, (ii) the power of control over the personnel of the administrative services through the power to appoint, direct and remove public officials, and (iii) the ordinance power.

(i) Power to  
organise  
departments  
and offices.

10. As regards the power to organise departments and offices, logically it ought to belong to the executive. But the organisation of departments and offices costs money, and the dependence of the executive on the legislature for supply has naturally led to the latter assuming in an increasing measure this power. The fact that the activities of a new department may affect in various ways the rights and duties of individuals has also operated in the same direction. Where the legislature has in addition the power to specify appropriations, the control of the legislature over the organisation of departments and offices becomes complete. Where, as in India and the Crown colonies of the British Empire, the legislature controls neither supply nor appropriation, the organisation of departments and offices remains entirely a matter of executive direction (a), except where it is intended to confer on the department in question power to affect people's rights and duties and impose obligations and penalties on officials which are to be enforced

Governing  
control of  
the legisla-  
ture through  
power of the  
purse.

(a) It follows from this that in India and the Crown colonies a legislative provision which involves the creation of a paid office must be previously examined and sanctioned by the authority which controls supply and appropriation, *viz.*, the Home Government or some one authorized by it.

through courts of law. The tendency undoubtedly is in favour of organisation by law replacing organisation by executive action. The following description of present conditions in England is illustrative of the tendency.

11. "The various government offices and departments, through the medium of which the general executive administration of the country is carried on, owe their creation and present internal organisation largely to the direct exercise of the discretionary authority of the Crown as head of the executive. But, though this is so, the constitution of the more modern departments and the powers and duties of the various officers and functionaries of whom their staff is composed, as well in the modern as in the older departments, are now principally regulated by direct Parliamentary enactment, or by Orders in Council issued under statutory authority" (a). As will be shown later on, the organisation of departments and offices by the legislature may impose important limitations on the control by the administrative services (b).

*E. g. in England.*

12. Mr. Frank Goodnow, speaking from his experience of American legislatures, seems to think that legislatures in these times are apt to be rather more wasteful of public money than the administration, and that the latter will organise an office more economically and more efficiently than the former; and that therefore the business of organising departments

Should departments be organised by the legislature or the executive?

(a) Halsbury, *Laws of England*, Vol. VII, pp. 79-80.

(b) It may be interesting to note the provisions in some of the written constitutions of modern States bearing on this point. The constitution of the United States, the (defunct Royal) constitution of Portugal (Art 101), of the Argentine Republic (Art 87) and of Mexico (Art 80) expressly give this power to the legislature. Those of Denmark (Art. 13), Holland (Art 77), Japan (Art 10), and Norway (Art 12) leave this in the hands of the supreme executive. The constitutions of France and Germany do not mention it, but the monarchic traditions of both countries makes the inference easy that in those States as in England the power rests with the executive. (Lowell, *Governments and Parties in Continental Europe*, p. 34). The constitutions of Hungary (Art 14) and Sweden (Art 6) expressly establish ministerial departments. In every country where the power is not expressly reserved to the legislature, the legislature acquires this power through its control over supply. Even in countries where the legislature has no such control, once a department or office has been organised by statute, further alterations in it must be also by statute. The authority to organise and control offices in India rests with the Secretary of State for India under the Government of India Act, 1915, sec. 2.

and offices had best be left to the executive subject to the financial control of the legislature (a). It is possible to assent to the conclusion without agreeing with the premises, specially as it appears to be warranted by the usual practice in the Continental governments of Europe. A legislature is likely to be stricter in the matter of providing the financial requirements of a newly created office when the organising of it rests in other hands than its own. But the proposition that legislatures are habitually more extravagant than the executive government assumes two things neither of which is universally or even generally true. It assumes, first, that legislatures everywhere must have the same motives for launching into expensive administrative schemes as the professional politicians who have monopolised the seats in American legislatures have shown themselves to be (b). Secondly, it assumes that the executive everywhere controls the public services and is nowhere controlled by them. Where the public services control the administration, as happens when the members of the controlling executive are largely drawn from a scientifically organised and highly paid civil service which not only mans all the important offices but is further held together by a strong *esprit de corps*, the executive unavoidably labours under a bias in favour of creating expensive public offices, which is not the less strong because it may, at least in the higher ranks of the service, be unconscious.

(ii) Control over the personnel of the services ; legislative encroachments on this power.

13. As regards control over the *personnel* of the administrative services there is nothing to prevent the legislature from reducing even this obviously necessary power to a minimum, and in fact in the State governments of the United States (c) this very nearly represents the actual position of things. The duties of the various offices may, as in the States, be minutely prescribed in the statutes establishing them (the direction of office business being thus left rather to the law than to the executive) whilst the appointment of officers itself may be taken out of the hands of the executive by either making it elective or dependent on the result of competitive examinations, the conditions whereof may be fixed

(a) Goodnow, *Comparative Administrative Law*, Vol. I, p. 13.

(b) As to this, see Bryce's *American Commonwealth*, Chs. XLIV-XLVI.

(c) See Goodnow, *Comparative Administrative Law*, Vol. I, pp. 79-80.

by statute as has been done in regard to many offices in most modern States, the removal of officials too being made to depend upon the expiration of terms fixed by law, as is the case with almost every administrative office in the United States (a), or conditional on an adverse judicial or quasi-judicial finding, as is the case chiefly in Germany (b). If all these conditions were combined for all the offices in a particular State, the control of the services in it would be thoroughly legalised. But this is one of those matters with which administrative control (not necessarily unregulated) should have more to do than administrative law. As this topic will be more fully examined in another place, it will suffice for the present to say only that the higher offices in almost all countries are filled by executive appointments, subject in some places, as in the United States, to the assent of the Senate. In the lower ranks of public service, however, in order to prevent jobbery and at the same time to secure a minimum of competency, competitive or other examination tests are being increasingly resorted to in most modern States ; whilst, except in the State governments of America, large powers of direction and removal are generally reposed in the executive. The Federal government in the United States has however, with the connivance of the legislature and law courts, been able to assume powers of appointment, removal and direction almost equal to that traditionally exercised in monarchic countries like England and Germany, and in France. In regard to offices which sound administration requires to be made altogether independent of executive interference, *e.g.*, high judicial offices and offices such as those of the Controller and Auditor General of England, and corresponding functionaries of the Chambers of Accounts and similar institutions on the Continent (c), it is now generally provided that they should be held during good behaviour, and their incumbents are made dismissible either on a joint address of both chambers of the legislature or as the result of a judicial sentence pronounced in a court of impeachment.

(a) See Goodnow, *Comparative Administrative Law*, Vol. II, p. 91-2.

(b) See Goodnow, *Comparative Administrative Law*, Vol. II, p. 100.

(c) *E.g.* in Italy. See Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 167, note 4 ; in Prussia, *Ibid*, Vol I, p. 290,      \*

(iii) The ordinance power.

14. With the ordinance power of the executive I have dealt fully in a previous lecture and need say no more concerning it here (a).

Auxiliary powers.

15. The five-fold classification of executive powers just concluded does not obviously exhaust all the varieties of executive business in which those powers find expression. The success or otherwise of any government has at all times ultimately depended on its financial administration. History furnishes instances where so-called governments have been known to depend in no small measure on loot or tribute obtained from alien territories. But it furnishes none where a nation has stayed a "robber nation" for any length of time. Its career has invariably ended either in its forced withdrawal from exploitation of alien territories or in the assumption of direct rule with its attendant responsibility for developing the resources of the conquered territory as much in the interest of the inhabitants of the territory as for taxing purposes.

(i) Financial.

(ii) Direction of colonies.

16. The wide extension of territory in the case of several nations of the present day, by conquest, settlement or otherwise, over lands separated from the Mother country by seas and oceans has created for these nations a special department of government business which does not ordinarily belong to Unitary States, the executive powers of which only formed the subject of analysis in the previous pages.

Resulting classification of departments.

17 A fairly exhaustive classification of departments of the central executive of the most advanced nations of the present day would therefore include, besides (i) the Department of Foreign Affairs, (ii) the Military Department, (iii) the Judicial Department, (iv) the Department or rather Departments (the number of which tends continually to multiply with the daily widening conception of the responsibilities of the State for the welfare of its subjects) charged with the Internal Administration of the affairs of the State, (vi) the Legislative Department, (vi) The Financial Department and (vii) the Colonial Department.

18. In most of the older forms of government, the departments have grown up gradually and have not been worked out as the result of a preconceived system ; and traditional

and other considerations modify the strictly logical arrangement of governmental business in all systems. Circumstances of different countries differ so materially as to impose on their respective governments different kinds of duties or at any rate to attach different degrees of importance to different kinds of business. Moreover, the conception of duty of some States may be more or less advanced than and may otherwise differ from that of other States. More therefore than the generalised classification of departments given above cannot be attempted in this place. To emphasise the fact however that the classification is logical rather than actual, I only point out here that in France, for instance, the supervision of administrative tribunals rests with the Minister of the Interior and not like that of the ordinary courts in the Minister of Justice (a); that England does not regard the Channel Islands, the Isle of Man and British India technically as colonies, so that the administration of the two former is supervised by the Home Secretary and that of the last by the Secretary of State for India assisted as previously stated by a Council (b), "protectorates" not closely connected with existing colonies being administered by the Foreign Office (c), whilst geographical considerations have mainly determined the creation of separate departments for Scotland and Ireland; and that the Military department in all countries possessing a seaboard tends to divide itself into two independent departments, viz: of the Army and the Navy.

19. A subordinate government like that of the States in the American Unions and a colony or dependency can ordinarily not have a department of foreign affairs of its own. Such diplomatic connections as the States of the German Empire are allowed to maintain with foreign powers independently of the Empire are unimportant survivals of times when the States were in fact independent. But in the British Empire, India, by way of exception, owing to the position she holds amongst the States of Asia on her borders and the protectorates within her geographical limits, is allowed to hold diplomatic relations with foreign and protected powers, in strict

Whether  
subordinate  
governments  
can have a  
Department  
(i)  
of Foreign  
Affairs.

(a) Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 58.

(b) Trotter, *Greater Britain*, 157-159.

(c) Lowell, *Government of England*, Vol. I, p. 86.

(ii)  
of Defence.

subordination however to the Home Government. Nearly all subordinate governments have organisations for purposes of defence similarly subordinated. The idea, at one time very prevalent, that the external commercial relations of a colony or dependency must be controlled by the Home Government is perceptibly giving ground within the British Empire, and thus the Self-governing colonies of that Empire have now each an independent department of Customs, whilst all other colonies, have Custom departments in direct subordination to the Home Government.

(iii)  
of Customs.

Departments  
of Internal  
Affairs, dif-  
ferently orga-  
nised in  
different  
countries

20. In both sovereign and subordinate governments, the evolution of new departments has been most rapid in the administration of internal affairs and a mere enumeration of these departments is often enough to give one a fair working idea of the matters that chiefly occupy the interest of the government of any particular country and of the problems which demand its special attention. In most advanced countries, there are to-day departments of Agriculture, Trade and Commerce, Posts and Telegraphs, Railways and Canals, Local Government, Sanitation, Ecclesiastical Affairs, Police and Education. There may be departments of Mines, Fisheries Inland Revenues, Public domains, Forests, Public works, and in countries with a large Native population ruled by White colonists, a department for specially looking after Native Affairs. The trend of administration in modern States is shown in a peculiar manner by the evolution in many States of a Ministry of Labour. In New Zealand, where State socialism has made the greatest progress, the Ministry of Industry and Commerce is also in charge of "Tourists and Health resorts." In France, the Minister of Public Instruction has charge of the "Fine Arts," whilst the Education Minister of the Imperial Government in India controls an "Archeological" section.

Their signi-  
ficance.

All depart-  
mental heads  
are not  
Ministers.

21. It need only be added that a Minister may and often must have charge of several departments, and not all heads of departments are necessarily admitted into the Cabinet or any similar body charged with the duty of co-ordinating the working of the several departments.

22. This brings me to a consideration of a topic the full importance of which has hardly yet been realised in many coun-

tries. The vastly increased business of government has made administration of all government business by Ministers in council assembled an impossibility. Each department must be left in the hands of the Minister concerned for nearly all purposes peculiar to that department. That this must be so is forcibly illustrated by the steps by which the council government, contemplated for India in the Government of India Acts of from 1773 to 1915, has since 1861 been converted into government by departments exclusively under the charge of particular members of the Executive Council of the Governor General. The Indian Councils Act of 1861 gave power to the Governor General to make from time to time rules and orders for the more convenient transaction of business in his Council, and it was provided that every order made or act done, in accordance with such rules and orders, shall be treated as being the order or the act of the Governor General in Council (a). Taking advantage of this provision, Lord Canning made rules assigning to each Member of the Council the charge of a separate department of the administration and the Council was (barring the fact that it was not made responsible to the legislature and dismissible by it) converted into a Cabinet of which the Governor General was the head. The separation of departments in India is said by a competent authority (b) "to be less complete than in England and the authority of the Member of Council over his department much less extensive or exclusive than that of an English Secretary of State." "While the Member of Council takes the place of the English Secretary of State, there is in each department a Secretary holding a position analogous to that of a Permanent Under-Secretary in England. It is the duty of this Secretary to place every case before the Governor General or Member of his department in a form in which it is ready for decision. He submits with it a statement of his own opinion. In minor cases the Member of Council passes orders which are final. If the matter be one of greater importance, he sends on the papers, with his own orders, to the Governor General for his approval. If the Governor General concurs, and thinks further discussion unnecessary, the orders are issued. If he does

Government by departments makes co-ordinated administration difficult.

Collegiate administration has nevertheless to give place to departmental.

An Indian illustration.

The manner in which the Viceroy's Council works.

(a) See sec. 40 (2) of the Government of India Act of 1915.

(b) Strachey, *India : Its Administration and Progress*, pp. 60-61.



not concur, he directs that the case shall be brought before the Council as in England an important case might come before the Cabinet. The duty rests upon the Secretary, apart from his responsibility towards the Member of Council in charge of the department, of bringing personally to the knowledge of the Governor General every matter of special importance," who, it will be remembered has power reserved to him to act on his own opinion alone, "whenever *in his own opinion* the safety, tranquility or interests of the British possession in India may be essentially affected" (a). And yet all orders must be issued in the name of the Governor General in Council.

The working  
of the English  
Cabinet.

23. As regards the working of the English Cabinet, Sir Robert Peel, it has been stated, closely watched every department of the government (b). But this, of course, is impossible at the present day. "Purely departmental business need not," says Lord Courtney, "and does not pass beyond the discretion of the individual Minister. But whenever any question of policy arises, and specially when any international or colonial episode of importance is in progress, memoranda are circulated among the Ministers, so that each is charged with the knowledge of what is going on, and has an opportunity of intimating an opinion upon it. It is in the prosecution of such matters that the members of the Cabinet are from time to time called together in Cabinet councils to discuss the situation and to determine what shall be done. Besides these meetings, there are others which may be regarded as of a more routine character, and which are necessarily held at particular periods. The legislation of the next session is settled at councils held at the end of the autumn. The leading Bill of the coming year may be marked out by circumstances which Ministers recognise rather than control, but the propriety of promoting other Bills is urged by separate Ministers and their claims compared. The scale of expenditure on the Army and Navy is about the same time settled in Cabinets in which the First Lord of the Admiralty, the War Secretary and the Chancellor of the Exchequer may be supposed to take leading parts. After Bills have in principle been determined upon, the examination of them in some detail is often referred to a committee

(a) Government of India Act of 1915, sec. 41.

(b) The Working Constitution of the United Kingdom, pp. 91-92.

of the Cabinet, to which for this special purpose may be added some member of the government not in the Cabinet, and after this revision they come back for final sanction. Later on the budget proposals of the Chancellor of the Exchequer, at first perhaps discussed with the Prime Minister and the Leader of the House of Commons and then circulated, are formally considered at a Cabinet council. The Cabinet is thus like a Court of Directors under the leadership of a Chairman, each with a department of his own, yet acquainted with the principal business transacted in the other departments and all meeting together from time to time to receive reports, to deliberate and to determine the course of business to be followed. Each brings to the performance of the work not only his own abilities, but the accumulated knowledge and suggestions of his permanent officers, whilst they all live in the common atmosphere of Parliament and in this way are made hourly familiar with the conditions which must influence if they do not govern their action" (a). Mr. Woodrow Wilson does not think that the administrative control thus exercised by the English Cabinet as a whole goes very far towards co-ordinating the business of government, such control being, in his opinion, "the result rather of the political responsibility of the Cabinet than of any conscious effort to integrate administration by the constitution of a body which shall habitually regulate, by semi-judicial processes, the main features and when necessary even the details of executive management (b). "In France and Prussia on the contrary", he says, "such an effort is made and is made with effect. In France, besides a Cabinet of Ministers whose function is wholly political, there is a Council of Ministers (c) whose single office is systematic administrative oversight, the harmonising of methods, the proper distribution of business amongst the departments, and above this Council of Ministers again there

Councils of  
Ministers on  
the Conti-  
nent.  
In France.

(a) *The Working Constitution of the United Kingdom*, pp. 91-92.

(b) The necessities of the War (just over) compelled the provisional establishment of a small "War Cabinet," the members of which (with the sole exception of the Chancellor of the Exchequer) were relieved of the day to day preoccupations of administrative work and whose time was, therefore, entirely available for initiating policy and for the work of co-ordinating the great departments of State. (See the War Cabinet's Report for 1917).

(c) The Council of Ministers, like the Council of State, is a common enough institution on the Continent of Europe. See Ogg's *Governments of Europe*.

In Prussia.

is a Council of State, a judicial body whose part it is to accommodate all disputes and adjust all conflicts of jurisdiction between the departments, as well as to act as the supreme administrative tribunal. In Prussia, there is a like system : a "Staat Ministerium," which to a certain extent combines the duties given in France to the Council of Ministers and to the Council of State, and also a Council of State which is by degrees being elevated to high judicial functions" (a).

In other  
German  
States.

24. The "Staat Ministerium," it appears, is not an institution peculiar only to Prussia. There are "State Ministries" in most German States. It is composed of the heads of departments who meet in common session, under a Minister President, who has no greater legal power than any other Minister. "The main function of the State Ministry is to preserve harmony and uniformity in the policy of the administration. On this account it is generally settled by law or ordinance what matters shall be decided by it, while further the Prince may generally send any matter to it for decision. Among the matters which by law or ordinance are to come before it are all government bills and drafts of general ordinances, the appointment of all higher administrative officers, and generally all matters which do not come entirely within the competence of one Minister. Further, whenever the views of one Ministry do not coincide with that of the Prince, the matter is to be submitted to the State Ministry. In all these matters, however, the State Ministry acts simply as an advisory body and simply lays before the Prince the result of its deliberation and then he decides the matters. Its decisions, of themselves, have no legal force whatever; and never bind any one of the Ministers who does not think that they are right. This, it is believed, would interfere with the principle of the responsibility of the Ministers for the acts of the irresponsible Prince. But if a Minister cannot conscientiously carry out a decision of the State Ministry, he is at liberty to resign, whilst, if he does not so resign, the Prince has the right to remove him from active participation in the administration" (b).

Condition in  
America.

25. Regarding the Federal government of the United States of America, Mr. Woodrow Wilson writes : "In our fede-

(a) Woodrow Wilson, *The State*, pp. 568-569.

(b) Goodnow, *Comparative Administrative Law*, Vol. 1, pp. 141-2.

ral organisation we have the President as Supreme Chief, but the Cabinet as a body does not usually exercise any concerted control over administration taken as a whole. Its conferences as a body are confined for the most part to political questions. Administrative questions are decided separately, by each department for itself, the only real central authority in administrative matters being the President's opinion, not the counsel of his Ministers. As regards points of administrative policy each department is a law unto itself" (a). But for complete absence of co-ordination one has to go to the State governments of the Union, where the heads of the departments hold office by election under a statutory tenure; "where statutes leave to no officer, either central or local, any considerable play of discretionary power: so far as possible they command every officer in every act of his administration," so that each officer may be said to "serve his own statute;" where therefore the State officials, nominally associated with the Governor, are neither his agents nor his subordinates except in formal rank and precedence, nor even his advisers. The position of these officials in relation to the administration is itself not that of a controlling but only of "a superior sort of clerical body," the central offices constituting "a system of supervision and report often, but seldom a system of control." (b).

26. I do not propose to go into further detail concerning the organisation of the administration. The general remarks made above and the details which have been introduced to illustrate them make it evident that as the responsibilities of Government are increasing, departments also are multiplying and with them offices and officials, these in their turn imposing on the central government the necessity of exercising organised and co-ordinated control over departments, offices and officials. The tendency in all central governments at the present day (if the State governments of the American Union only be excepted) is on the whole in the direction of developing some kind or other of a bureaucracy (c).

General drift of modern administrations towards bureaucracy.

(a) Woodrow Wilson, *The State*, p. 568.

(b) Woodrow Wilson, *The State*, pp. 498-499, 500, 501, 506, 568.

(c) Even the exception in favour of State governments in America is on the way to being minimised by legislative provisions tending towards bureau-

## LECTURE XII.

### ORGANISATION OF THE CENTRAL EXECUTIVE (Contd.)

#### (III)—*Organisation of Offices & Services.*

1. In dealing with the organisation of the central administration, it is not possible to stop with the organisation of the departments, for the organisation of offices and services forms a most important element of that administration.

Organisation  
of offices.

2. As to the organisation of offices, it will be remembered that many of the general observations I made with reference to the organisation of departments were expressly stated to

The Adminis-  
tration Code  
of Illinois.

cracy if the example of Illinois should be (as is not unlikely) widely followed : The Administration Code of that State (which was passed on March 7, 1917, and came in force on July, 1, 1917) creates nine Departments of State, *viz.* of Finance, Agriculture, Labour, Mines and Minerals, Public Works and Buildings, Public Welfare, Public Health, Trade and Commerce, and Registration and Education, each department to have a paid Director, and varying numbers of paid assistants designated by the statute, which lays down their qualifications and the amounts of their salaries. They are, with a few exceptions, to be whole time officials and shall hold office ordinarily for four years, the power of appointment resting under the statute with the Governor acting with the advice and consent of the Senate. The Directors have power to prescribe regulations, not inconsistent with law, for the government of their departments, the conduct of their employees and clerks, the distribution and performance of their business, and the custody, use and preservation of their records, papers, books, documents and property pertaining thereto. Associated with the Directors of some of the departments are advisory and non-executive boards of lay unpaid members, as to whose appointment and qualifications also the statute lays down detailed directions. These advisers too are to be appointed for terms by the Governor. *Chicago Legal News*, Vol. XLIX, No. 49, pp. 385 etc.

The New York Constitutional Convention of 1915 found the executive branch of the State government "ill compacted, confused, extravagant, subject to no effective control ; over one hundred and fifty agencies, great and small, all over the State, were carrying on business, and were responsible, practically to no one. Every one spent all the money he could get, every one acted in accordance with his own judgment"—no one "held to responsibly or subject to the effective control and limitations of inspection and supervision." The Convention proposed to "condense the fifty-two agencies of the State into seventeen departments," such under one head who was to be responsible to the Governor. The proposal with others effecting other branches of the administration proved too radical for the people and was defeated. Elihu Root, *Addresses on Government and Citizenship*, pp. 119, 215, 216.

apply to that of office as well and it is not necessary to repeat them here. The only matter bearing on this topic which need now be considered is the several ways in which the conduct of office business may be organised. For the discharge of purely administrative functions, a single-headed system finds most favour as the one which best ensures energy and decision in the performance of official duties and facilitates the fixation of responsibility in relation thereto. But for administrative duties requiring deliberation, *e. g.* for purposes of assessment, a collegiate or board system is (as for all judicial purposes) considered the most suitable. In France and several other countries on the Continent of Europe, the advantages of both systems are sought to be secured by providing heads of offices with advisory councils whom ordinarily they must consult but whose advice they are not bound to follow.

Single headed  
or collegiate.

3. As regards the organisation of the services, several systems are found simultaneously in operation in most modern States, and it is not likely that any one will be found to suit all cases in any country. The aim of all governments should, of course, be to find out which kind of service is the most suitable for which offices or classes of offices and to utilise each with as little regard for extraneous considerations as is practicable.

Organisation  
of services.

Different sys-  
tems suited  
to different  
services.

4. It is usual for writers on this topic to distinguish salaried from honorary services, and permanent offices from those the *personnel* whereof change with every change of party in the central administration. It is noticeable further that though salaried services are most often permanent ones they need not invariably be so, just as unsalaried services though generally limited to short terms may often be permanent. In England, all the political offices carry respectable salaries, though their tenure must in its very nature be non-permanent, and many of the highest offices in the British colonial administration are held on handsome salaries for a fixed term of four or five years. On the other hand, the Justices of the Peace are free to perform their honorary functions for the natural terms of their lives, provided they do not forfeit their appointment sooner owing to misconduct. But the backbone of the English administration is furnished by the permanent services, of which I shall have more to say presently. In the United States of America, however, by a peculiar and pernicious political

Salaried and  
honorary  
services

Permanent  
and rotative  
services.

The "Spoils System" of the United States and Italy, its evils.

development, the services have until recently come to be almost wholly of a temporary character, liable to be vacated with every change in the political leadership of the country. This system, very appropriately styled "the Spoils system", is however by no means peculiar to the United States. It flourishes exceedingly in Italy and to a considerable extent in France also (a). The system is open to objection in two ways : *First*, service under this system (as also in the case of most honorary offices) cannot be whole-time service, and must therefore be inefficient and for offices needing technical or long administrative experience wholly unsuitable. *Secondly*, it offers a ready instrument for all forms of political corruption. The prevalence of the "spoils system" in any country is really symptomatic (at least at the present day) of widespread political corruption.

Permanent paid service, habitually subjected to lay control in England as a safeguard against bureaucracy.

5. Permanent service, to be efficient, must on the whole be paid and made otherwise attractive. Ideally no system seems to promise more in the way of efficiency than one which in all its ranks is paid permanent service. In the abstract, too, a system which relies either entirely or mainly upon honorary officials should also be the most inefficient. And yet the records of English history clearly prove how well and efficiently the Justices of the Peace in England served their country for centuries, at any rate until the "Industrial Revolution" came and in incalculable ways upset the entire economic organisation of the country. But though, since 1834, there has been a rapid growth of the professional element in the English administration, the principle of unpaid service is still in force in undiminished vigour. So strong is the English people's aversion for bureaucracy that it seems to it that the professional element is held under effective control by a lay element of popular origin. The idea of combining the lay with the professional element for administrative purposes,

(a) Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 157. The important office of the Prefect and many other offices in France appear to have become subject to the same system. Wilson, *The State*, pp. 228-229, 237. But Mr. Lowell says that a wholesale change of public servants, such as has often taken place after a Presidential election in the United States, does not occur. *Governments and Parties in Continental Europe*, Vol. I, pp. 130-132. As to the United States, see Fairlie, *American National Administration*, pp. 73, 252-257.

the former having the last word in every matter, is one which, as pointed out before, runs through the entire administrative system of England. A permanent hereditary King lends the benefit of his experience and advice to a popularly elected lay Prime Minister, who however determines the policy of the administration on his own personal responsibility. A permanent (a) Under-Secretary controls the inner working of the department in all its details, but subject to the orders of a popularly elected Minister, which he loyally carries out even when contrary to his own opinions. Judges direct a lay Jury on facts as well as on the law, but the ultimate decision of the case rests with the latter. The Justice of the Peace, a lay official, is guided but not controlled by his salaried clerk and the same is the relation of Borough and County Councils and their paid permanent officials ; and in Colonial administration, Governors and some of his Councillors are for the same reason generally chosen for short terms from outside the ranks of the permanent services. An administration which is carried on, on the whole, by experts but controlled ultimately by and paying all deference to popular opinion, it has drawn high encomiums from a discriminating American student of political methods whose studies in this field have by no means been confined to administrations in Anglo-Saxon countries (b). But a more conclusive testimony is furnished by the deliberate adoption of this method in that stronghold of bureaucracy, Prussia. The details of the changes made in this direction in the local administration of that country I have already given. I have also shown how the rule of professional experts is importantly modified by associating with them popularly elected councils and "permanent deputations" thereof in France, Holland and Belgium, amongst other European countries (c).

(a) It is perhaps necessary to say that the tenure of officials belonging to what is known as the Permanent Civil Service is in law terminable by the State at will. Permanency of tenure is secured by custom, arising out of the sentiment that a man has a vested interest in the office that he holds. Lowell, *Government of England*, Vol. I, pp. 153-154 and Lecture XVIII *infra*.

(b) See Lowell, *Government of England*, Chs. VII, VIII and XL.

(c) See Albert Shaw's *Municipal Government in Continental Europe*, Chs. II and III. "Provincial and municipal self-rule in the Netherlands", says



Defects of professional service.

(i) From the point of view of efficiency.

6. The truth of the matter is, that a purely expert administration has the defects of its qualities. "Experts acting alone", says Lowell, "tend to take disproportionate views, and to get more or less out of touch with the common sense of the rest of the world. They are apt to exaggerate the importance of technical questions as compared with others of a more general nature, a tendency which leads either to hobbies, or where the organism is less vigorous, to officialism and red tape. These evils have become so marked in the case of some governments as to give rise to the ill name of bureaucracy" (a).

(ii) From the political point of view.

7. There are, according to this author, other more serious dangers to be apprehended from bureaucracy, viz., the political influence which a numerous and regimented official class may exert upon government to the detriment of public interests. In England, before 1868, large classes of officials did not have a vote, and it was in 1874 only that Acts imposing penalties on officials for taking an active part in elections were repealed. Officials are still restrained from taking active part in politics by office regulations, but this has not prevented certain classes of government employees from organising themselves in order to use their electoral rights to bring pressure to bear upon members of Parliament in favour of increasing their own pay and improving the conditions of their work. "If their influence," says this writer, "is exerted only to raise wages in a service recruited by competitive examination, the evil is not of the first magnitude. But it is not difficult to perceive that such a power might be used in directions highly detrimental to the State. There is no reason to expect the pressure to grow less and mutterings are sometimes heard about the necessity of taking the franchise away from government employees. That would be the only effective remedy, and the time may not be far distant when it will have to be considered seriously" (b).

Its attempt in England to influence the electorate.

Suggested remedy.

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this author, "is more complete than in France". Of the Spanish system, the author writes, "the general lines of the whole administrative organisation are the familiar French lines, but a much firmer stress is laid upon local autonomy." The same, I think, may be said of the Scandinavian countries also, whilst Italy, as has been already stated, follows closely on the heels of France. See *Ibid.*, Ch. IV, for a description of Italian City administration.

(a) Lowell, Government of England, Vol. I, p. 173.

(b) Lowell, Government of England, Vol. I, pp. 148-153.

8. The "political danger" alluded to here has already been felt in "the new democracies of Australia with their armies of public servants on State railroads ; and indeed the pressure constantly brought to bear on the legislature in favour of this class caused Victoria in 1903 to re-adjust her election laws. The employees of government have not been disfranchised altogether, but they have been deprived of the right to vote in the regular constituencies and have been allotted one representative in the Legislative Council and two in the Assembly to be elected entirely by their own class. They have therefore their spokesmen in the legislature, but they are no longer able to influence the other members as of old " (a).

How met in  
Victoria.

9. In Prussia, the qualified lay control established by the Local Government Acts of the seventies and eighties of the last century has not established anything like the relation which exists between the Borough and County councillors and their permanent officials in England. The bureaucracy serves the central government and not the local elected authorities. But by the application of iron discipline this bureaucracy has been kept to its position of a servant of the government and has not been permitted to instal itself as its master. Government is frequently charged with influencing elections through its officials, but the officials have never been known to have intended or been able to influence elections in their own interest. The complaint against the Prussian administration from the popular point of view has not been that the bureaucracy maintains its hold on the administration in the interest of the services themselves, but that this highly organised instrument of autocracy is employed or sought to be employed in the interest of one amongst the classes, into which Prussian society still seems to be irreconcilably divided. It was in order mainly to reduce the influence upon the administration of this class of landed aristocracy, that the reforms in local government previously described were introduced by Prince Bismark, and the composition of the lay element in the local committees of control so contrived as to bear a large proportion of men of the well-to-do classes outside the landed interest. Prussian officials, according to Mr. Lowell,

Prussian  
bureaucracy.

Does not  
control but is  
controlled by  
Government.

Bismark's  
measures  
against  
its abuse in  
the interest  
of a class.

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(a) Lowell, Government of England, Vol. I, p. 148.

Appreciation  
of Prussian  
bureaucracy.

"are intelligent, honest and active, and although somewhat rigid and autocratic, do not appear to be excessively tied by routine. Nor is the administrative system in its actual working highly concentrated as compared with those of other Continental nations, for the officials do not feel obliged to refer every important question to their superiors but are willing to act on their own responsibility within their spheres of duty. An apprenticeship and examination are required for admission, and a severe discipline is maintained by means of special tribunals, whose consent is required for the dismissal without a pension of any permanent member of the civil service (a). These conditions explain the existence of a dictatorial power on the part of the officials, and a constant interference in the affairs of everyday life, which under a system of favouritism and spoils would be wellnigh intolerable" (b). Nevertheless, adds Lowell, the enormous powers of this excellently organised bureaucracy could hardly be endured without the restraint exercised by the administrative courts. In fact, one of the main ends sought to be achieved by the reforms in local administration alluded to above was to reduce the power of the bureaucracy (its other main object having been as already indicated the reduction of the political influence of the junker interest) and the restoration of the confidence of the people in the justice of the bureaucracy without serious detriment to its energy. The administrative courts, which were established to attain this end, are said to be "more independent of the government and hence in a better position to control the officials than in France; for in the lower ones a majority of the members are private citizens chosen by local representative assemblies and serving without pay, while the highest is composed of men appointed by the King for life and protected like the ordinary judges, so that they can neither be removed, suspended nor transferred without the approval of a judicial tribunal" (c). "The whole subject of adminis-

Control of  
administra-  
tive courts,

(a) The *Disciplinarhof* which has jurisdiction over officials appointed by the King or the Ministers and must be consulted in cases of appeals by other officials contains in addition to administrative members at least four Judges of the Court of Appeal, all the members being appointed for three years. Lowell, *Governments and Parties in Continental Europe*, Vol I, p. 293, note 2.

(b) Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 293.

(c) *Ibid*, Vol. I, pp. 295-296.

trative justice as a branch of positive law is," according to this writer, "still in its infancy in Prussia," but he evidently anticipates a great future for it. (a).

10. The bureaucracy of Austria appears in contrast with that of Prussia, to be quite unregenerate. Its members enjoy a stable tenure of office and can be dismissed only for crime or by means of disciplinary proceedings. Its power is almost unlimited, for the guarantee provided in the constitution against its abuse is by no means thoroughly effective. It is also said to be corrupt. But like the Prussian bureaucracy it seems as yet to bring politics very little into its work. "It makes one shudder to think," says Lowell, "what will happen in Austria, if the parties ever get control of a bureaucracy" at once corrupt and possessing enormous power to interfere in every man's affairs (b).

The Austrian  
bureaucracy.

(a) Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 226-227.

(b) *Ibid*, Vol. II, pp. 78-79. This would have been the proper place for an examination of the now defunct Russian bureaucracy, if it could really have been regarded as a civilised institution. From the account given of it by Mr. G. H. Perris in his "Russia in Revolution," it appears to have been cruel, unintelligent and corrupt, besides being altogether unrestrained by law. While the Tsar," says Mr. Perris (writing on the eve of the proclamation of the Constitution of 1906), "continues in theory to be omnipotent and absolute, it is evident that in practice the Imperial power tends to fall into the hands of the bureaucracy" (p. 51). "Even the lower officials and policemen have the power of satraps over the population." "The Emperor of all the Russias," having been (by the terms of the first article of the Russian Code), "an autocratic and unlimited Monarch," the bureaucracy had of course no difficulty in arming itself with all kinds of freakish and mischievous laws and ukases for application upon the people. But even this, it seems, did not serve its turn fully, for it allowed itself the privilege of keeping as much of the laws as it liked secret. Nor were the "secret laws" required to be consistent with those that had been "promulgated." The "promulgated" law granted "complete freedom of religion to all Russian subjects", but the prosecution of Jews and Dukhobors was judicially defended by special unpublished "statutes." "But all such minor instances of extra-legal law making," says Mr. Perris, "sank into insignificance besides the wholesale breach of civil order involved in the system of exile and imprisonment by 'administrative order' and the application of the martial law statute by which, at any moment, the extremest powers could be placed in the hands of Governors General and Provincial Governors." "With such opportunities and traditions it would", he goes on to remark, "be absurd to look to the administration to display a legal spirit in its daily work. In fact lawlessness marked that work from top to bottom." In their turn the ordinary officials had no legal protection against their superiors, exactly as the people

The Russian  
bureaucracy.

Dr. H. A. L. Fisher on the Indian Civil Service.

11. But the most powerful bureaucracy in the world of the present day, or indeed of any time, is that of India. Of its true character, the latest, the most authoritative and also the fairest account is that contained in a lecture on "Imperial Administration" recently delivered by Dr. H. A. L. Fisher, after he had concluded his labours on the Royal commission to enquire into and report on the public services of India. "The Indian Civil Service", says Dr. Fisher, "is the Government". It is the premier service not merely in matters of pay and precedence; it is "the political, the governing service of the country". The other services are excrescences, later developments due to specialisation, grafts upon the parent tree... The Indian Medical Service, the Indian Forest Service, the Public Works Department, the Education Department, the Police Service, have in every generation possessed officers of ability and distinction, but however distinguished an officer of these services may be, he is always subordinate to the head of the district who is a Civilian". The hegemony of the Indian Civil Service over the other services is maintained from the District and its Sub-divisions up to the Secretary of State's Council.

It controls the Government.

12. "The larger lines of Indian policy may be shaped by a Secretary of State in the India Office, and a powerful Secretary of State may make his influence felt very strongly on the direction of Indian affairs, if he encounters no serious opposition from the Government of India. But in reality the last word lies with Indian official opinion, in the sense that a measure would not be forced upon India against the united opposition of the Indian bureaucracy, of the Indian Viceroy of the Indian Governors and Lieutenant Governors.....The

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had no legal protection against them. An official could be dismissed or punished by his superiors on suspicion alone, but on the other hand officials could not be made liable to legal penalties without the express authorisation of their immediate superiors. It was quite in the spirit of the administration that the Russian Code, by its 249th Article, provided the death penalty for, amongst others, those "who shall intend to change the existing form of government" and, "having power to inform the government thereof, do not fulfil the duty." See Ch. III, "The land without law," in G. H. Perris's "Russia in Revolution." Not much improvement, it appears, was really effected by the constitutional changes of 1906. The defunct administration of Russia, like that of Sparta, furnishes matter of deep pathological interest to students of politics.

Indian Councils cannot turn out a Government and cannot make a Government. The Indian Civil Service is the Government. It may accept amendments, it may withdraw a measure in face of criticism which it judges to be well founded, it may profit by the suggestion of non-official members, but it is master in its own house. Cabinet councils, government majorities, diplomatic agencies in the Native States, administrative agencies in British India—all are provided by the Indian Civil Service, that wonderful bureaucracy recruited by a competitive examination in London, which is expected to turn out judges, revenue officers, heads of administrative departments, pro-consuls, legislators, political officers or diplomats, and under the new regime, parliamentarians as well”.

13. Dr. Fisher does not hesitate to say that if the administrative system had to be created for India for the first time to-day, “there would in all probability be no one service so prominent among the other services as is the Indian Civil Service, or so exclusively entrusted with the central functions of advice at the headquarters of Government. The executive head of the Government would have a wider choice of secretaries and advisers, there would be more equality in pay and prospects between the different branches of the public service, more interchangeability, a less rigid system of administrative caste. In its relations to the other services, it has also developed a very close and jealously guarded doctrine of vested interest, the higher posts in each service being regarded as the perquisite of the service, a prize against which recruitment has been made, and consequently not to be abolished until the vested interest of every person recruited against them has been satisfied”. “The critics”, he does not fail to note, “have not been slow to descry the dangers, temptations, and anomalies incidental to the working of this highly disciplined professional hierarchy”. “*Esprit de corps*,” he adds, “is no doubt a valuable feature of public life and there is no *esprit de corps* so strong as that of the Indian public services. The Indians themselves not unnaturally regard these services as manifestations of the European spirit of caste” (a). In one word, the

“A rigid system of administrative caste.”

“*Esprit de corps*”.

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(a) The Empire and The Future (Macmillan and Co., Ltd, 1916), pp. 52-58. The Montague-Chelmsford Reform proposals (if adopted) will result in the transfer immediately of a number of departments to Ministers responsible to

Indian Civil Service has been suffered, if not encouraged, to become a privileged ruling caste as exclusive and as jealous of its vested interests in the Government of the country as were the feudatories of the Japanese Empire under the Shogunate. It is no doubt recruited by means of an open competitive examination—examination, however, which must be held only in London, so that so far as the Indian population is concerned, it must continue, as long at least as the present system lasts, to be a close aristocracy, not of talent only, but of race, nay, even of colour. Should the day ever arrive when in the interest of the population of India, the Indian Civil Service will be asked to lay down its privileges as were the Daimios of Japan by Imperial rescript, on the ever-memorable 29th of August 1871, will that Service, the ablest, the most scientifically organised, the most considerate and conscientious, and yet also the costliest (a) in the whole world, be found as ready to efface itself as were the feudal chiefs of Japan? The sacrifice demanded of it will be the harder because, taken as a whole, India is not the land of its birth (b). It is possible, however, that no such wholesale surrender of power will be demanded at any one moment. The non-official leaven may be introduced gradually and tentatively as in Prussia, but the transition is more likely to be directly from the Indian to English conditions for there is precedent only for such a transition in the British administrative system, viz: in the case of those colonies which have passed from the Crown colony to the Self-governing stage.

The way out  
of it.

representative Provincial legislatures with the consequent subordination of members of the Civil Service in such matters to these bodies. To that extent the Indian Civil Service will cease to be the "Government." The Report fore-shadows measures for the "protection of Service interests" from apprehended interference by these bodies. What form these measures will take it is impossible to surmise from the Report. Members of the Service will probably be given a *quasi*-legal tenure in their appointments, as to which see Lecture XVIII *infra*, para 21.

(a) The Empire and The Future, pp. 58-59.

(b) In the present connection, it is necessary to take note of an argument one sometimes hears urged in all seriousness that the Crown colony and Indian services should be maintained in their present condition for the training they afford to young men of talent in the British Isles to become rulers of men. (See Lucas, *Greater Rome and Greater Britain*, p. 153). It is a remarkable fact that England and Holland the two countries where self-government has had the freest play have also been the most successful in

Fallacy of  
the argu-  
ment that the  
Indian and  
Colonial ser-  
vices furnish  
training  
ground  
for rulers,

14. But of all the drawbacks which operate as counterpoises to the varied merits of bureaucracy in general, the greatest is that it relegates all the business of government, the highest that can occupy the time and talents of men, to a small minority, leaving the bulk of the population, at best, wholly uninterested in the affairs of the administration. A population ruled by a bureaucracy does not 'love' its government, has no impulse towards loyalty, is indifferent as long as things go well, and becomes captious and querulous the moment affairs (as they often must in even the most wisely governed of countries) begin to turn out ill. In times of greatest danger to its government it will remain unmoved, as were the German people at the commencement of the last century by the spoliation of their governments by Napoleon, and will not be induced to make the simplest sacrifices to save it. When, however, as often happens, an effective portion of the population is not merely uninterested but critical, a self-contained bureaucracy is, of all forms of government, the least able to reconcile the politically conscious elements of the population with itself. These, under a bureaucracy, never obtain adequate political training, and nothing is more dangerous to the safety of the body politic than to let political education lag too far behind political consciousness, for the revolution it sooner or later brings on turns inevitably into anarchy (a). The criticism of the government of the Intendants in France that "it tended to make the people it ruled

Th inherent drawbacks of burcaeracy.

It tends to make the population unpatriotic, if not revolutionary, and accentuates class antagonism.

their colonial policy, whilst the reverse has been the case with France and Germany which provide at home an almost ideal "training ground of rulers" in the above sense. "If Englishmen", it has been well said, "have established order in countries which could not create it for themselves, it is only by virtue of qualities developed through ages (of self-government in their own country) in which their own characters have been tempered and moulded by their own mistakes, and such justice as Englishmen have imported into India has been learned in the doing of much injustice amongst themselves." (Lionel Curtis, *Four Studies of Indian Government*.)

(a) This appears to be what is now happening in Russia. There "public responsibility was limited to Municipal and District boards. In the Imperial and Provincial Governments the educated classes were confined to criticising the executive over whom they had no control. In the political sphere they were left without responsibility for seeing that the government was carried on." "The natural result," says an acute student of political institutions (Mr. Lionel Curtis), "is that they have been able to destroy government but have proved utterly incapable of evolving any government of their own, which they could



both revolutionary and servile instead of accustoming them to proceed by prudent reforms" seems to be applicable to all forms of bureaucracy which fail to interest the people in the administration by giving the latter that power of direction which alone can create such interest. In the absence of larger interests to occupy their minds, sectional interests loom disproportionately large, and bureaucratic governments, not rarely, have in this way unwittingly accentuated class-antagonism amongst all sections of the people (a). The task of destroying the German peril in which the free nations of the world are to-day engaged (b) would have been far easier to accomplish if the German governments had not forestalled the contest as much by secret military preparations as by allowing the best of their people a share in the government, so as to make them feel that their governments, such as they are, are their own. The latest phase of the constitutional movement which began at the end of the 18th century, significantly enough, expresses itself in an universal desire to nationalise the administration in every part of the world.

Permanent professional service indispensable to modern progressive administration.

How it should be controlled.

(i)  
Subjection to disciplinary control by Government.

15. But when so much has been said against bureaucracy pure and simple, it has also to be borne in mind that government is coming to be more and more a business of experts, or at least business in which dependence on experts (who must specialise in their particular services from early youth and must therefore be given life tenures in such services) is becoming more and more indispensable. Bureaucracy of some sort there must therefore be in all progressive countries. The general survey just concluded of the several forms of bureaucracy now in existence (and along with this may be considered the accounts of the Athenian and Roman bureaucracies previously given) seem to point to the conclusion that a bureaucracy can be permanently beneficial to a country only if it is not allowed to make itself "the master of the house." It must first of all be effectively controlled by the central government

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bring themselves, let alone the illiterate majority, to obey." Political responsibility which alone gives real political education should thus accompany and not be made to wait indefinitely upon the development of political intelligence.

(a) This has been noticed to have been particularly the case in Germany. See Goodnow, *Comparative Administrative Law*, Vol. II, p. 11.

(b) As this is going through the press, the armistice of 11th November 1918 has already brought the war to an end.

as in most Continental countries of Europe and Japan, and, in so far as the *esprit de corps* spoken to by Dr. Fisher allows, in India. It must also share its powers with, if indeed it be not controlled by, the politically conscious elements of the population. It must thirdly be amenable, for violations of the law, to trial in courts of justice not controlled by itself. It must finally satisfy the original condition of its existence, viz: efficiency. This of course does not mean that the services which are not professional can be left to remain inefficient. One of the most important matters for consideration in any study of administration, must therefore be the terms and conditions governing the internal regulation of the services, both lay and professional. The enquiry into this matter, as into all matters of administrative organisation, turn round two points, viz: (i) how far the services should be regulated by law, and (ii) how far their regulation may or must be left to executive discretion.

(ii)  
Subjection  
to popular  
control.

(iii)  
Subjection  
to law.

(iv)  
Elimination  
of patronage.

Internal  
regulation of  
services  
whether  
should be by  
law or left  
to executive  
discretion.

16. With reference to this inquiry, it will be convenient to divide officials into two classes, (i) elected and (ii) appointed. As regards the former the very fact that the officers are elected takes their case largely out of the discretion of the executive, and whatever control has to be exercised upon the composition of this class of service must be by law. It is very necessary in regard to this class of service that the law should prescribe definite and verifiable qualification tests, for whatever virtues a popular electorate may have, the capacity to judge and discriminate between the merits of respective candidates for office is not one of them and the possession of the minimum of qualification must be guaranteed by the law. For this reason the elective method is the least suited for filling offices the efficient performance of whose duties requires professional or technical knowledge. The main object sought to be secured by the elective method is no doubt to ensure popular control over the administration. The object is, however, liable to be defeated by the apathy of large bodies of electors—an apathy which is apt to increase in proportion as the office ceases to possess a limited local interest. There is also the danger of elections being controlled by “bosses” or “rings.” Both these dangers are likely to be reduced with the progress of the people in political education. Meanwhile there must be laws to prevent and penalise corruption and other malpractices at elections. To cope with the apathy of electors, the law in some

(i)  
As to elective  
officers.

Qualification  
tests should  
be laid down  
by law.

Law penalising  
corrupt  
practices at  
elections.

Necessity of political education to cope with apathy and corruption.

countries makes the voting privilege compulsory (a), whilst in order to promote political education amongst the masses so that they may be enabled to exercise their electoral privileges intelligently, Belgium, alone amongst the nations, in 1883, enacted a law prescribing an educational amongst other qualifications for provincial and communal franchise—one of the several tests prescribed for the possession of this qualification being the passing of an "electoral examination" (b). The movement, originally started in America and now spreading in all democratic countries, in favour of teaching elementary notions of politics in school, aims at the same end (c).

(ii)  
As to appointive offices, regulation by law needed to eliminate evils of patronage.

17. The law (d) has not left even appointive offices unregulated. In constitutional governments, there is a growing disinclination to allow gifts of offices to be made mere matters of patronage. From the point of view of efficiency, the result of unintelligent election can hardly be worse than that of abused patronage. If the temptations for such abuse were not so great, the law might well have contented itself, as in the case of elective offices, with prescribing the minimum of qualification needed to ensure efficiency, leaving the actual selection from amongst a number of candidates of the required qualification to the head of the office; for, undoubtedly, the best possible selection to vacancies are those which a conscientious office chief makes on his own responsibility. But there are few men who, like Napoleon, are so constituted that they can never perpetrate a job. The tendency accordingly has been in all progressive countries to remove all but the highest and the lowest offices (as to appointment at least) from the sphere of personal caprice and substitute for the discretion of the head of the office an examination test.

The examination system.

(a) This is the case in Spain, Belgium and some provinces of Austria. See Ogg's Governments of Europe.

(b) Shaw, Municipal Government in Continental Europe, pp. 218-220.

(c) Failing other guarantees, a small electorate, it should be remarked, facilitates corrupt practices at elections, whilst a wide franchise tends to make resorts to such practices unprofitable.

(d) Speaking generally, in the regulation of appointive offices, law and executive decree have almost equal part, in some countries as in England the former, and in others, e.g. France, Germany and India the latter predominating. The executive decrees are however so invariably followed, that they have in effect the force of law, and no useful purpose will be served by keeping the two distinct in dealing with the present topic.

The examination system appears to have been best developed in Prussia, so that jobbery in public appointments has been made practically impossible. The German bureaucracy, conscientious and incorruptible, does not tolerate incompetency or amateurism within its ranks. The examinations are none the less severe for being pass examinations.

(i)  
In Prussia.

18. In France, for technical and professional branches of the service, the candidates have to pass successfully through schools established by Government for the purpose of training men for these branches of the service ; and for the ordinary administrative services, there are open competitive examinations. In England, up till 1834, the patronage system had full play. Between that year and 1841 certain pass examinations were established for recruitment in several departments, but the open competitive method of examination dates from 1853 and became general by 1870. Permanent Under-Secretaries, assistant Under-Secretaries and Chiefs of branches are however exempted from all examination tests. In the United-States of America, both in the National and State Governments, the custom of "rotation in office and spoils" (which fixes the term of nearly all offices to four years and under which it is generally expected that the new administration (a) will not re-appoint the old incumbents) is so firmly entrenched that the method of appointment by examination though strongly advocated has made little headway. After some not very successful experiments by the Congress, in 1853, with pass examinations for the clerical service of several departments at Washington, President Grant in 1870 obtained powers from the legislature to frame rules for organising the services under his control on a more permanent basis and the result was the Civil Service Commission and Rules introducing a system of competitive examinations for appointment to certain services of the Federal government. The example thus set has been followed to some extent in New York, Massachusetts and in the City of Philadelphia. But, for

(ii)  
In France.

(iii)  
In England.

(iv)  
In the United States.

(a) It need hardly be stated that the *personnel* of the central administration is liable to change at every election which takes place generally at intervals of four years, so that there is a general re-constitution of the entire service with every change in the Presidency.

all this, the application of the competition test is still limited within very narrow boundaries (a).

(v) In India.

19. In regard to India, the Charter Act of 1793 (modified by the Indian Councils Act of 1861) reserved to members of the so-called Covenanted Service, appointed in England, the right to hold in ordinary circumstances the principal civil offices in India under the rank of Member of Council. The offices will be found enumerated in a schedule of the latest Government of India Act of 1915. It includes the offices of the Secretaries to Government, the Head of the Account Department, the Civil and Sessions Judges, Magistrates and Collectors of Districts in the Regulation Provinces, Joint and Assistant Magistrates and Collectors, Members and Secretaries of the Board of Revenue, Commissioners of Revenue and others. The members of this service, now known as the Indian Civil Service, are since 1853 recruited by a competitive examination held in London. The examination is held under the superintendence of the Civil Service Commissioners under Rules which sec. 97 of the Government of India Act of 1915 requires the Secretary of State for India in Council to make with the advice and assistance of the Civil Service Commissioners. Persons not belonging to the Covenanted Service can under secs. 99-100 be appointed, under special circumstances, with the approval of the Secretary of State (b) and a majority of his Council. The wide powers conferred by statute on the Secretary of State in relation to the officers and servants of the Indian Government are thus substantially modified by these and other statutory provisions relating to the Civil and other Services, *e. g.* those relating to appointments to the Council of the Secretary of State and to the Executive Councils of the Governor General, Governors and Lieutenant Governors, to High Court Judgeships and to the Ecclesiastical establishment (c). The qualifications to be possessed by High Court Judges and the manner in which they are to be recruited are laid down in the statute, but otherwise the appointments to these offices rest in the discretion

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(a) See Goodnow, *Comparative Administrative Law*, Vol. II, Book IV, Chs. II-VI, and Lowell, *Government of England*, Vol. I, Ch. VII; Fairlie, *American National Administration*, pp. 252-257.

(b) See sec. 2 (1) of the Government of India Act of 1915.

(c) Government of India Act, secs. 3, 36, 47, 55, 101 and part X.

of the executive. The appointments to the Councils, subject to similar qualification and other tests, also rest in the discretion of the executive government. As regards the reserved appointments, they were before 1853 in the gift of the Court of Directors who had maintained till then a preparatory school for the Civil Service in India at Haileybury, at which their appointees were educated prior to their entering in the service of the Company under "covenants" whereby they bound themselves not to engage in trade, not to receive presents and to subscribe for pensions for themselves and their families, amongst other matters.

20. In 1853 however this system of nomination to the "Covenanted Service" was abolished by Parliament and the service was thrown open to public competition of all British subjects without distinction of race. This made it possible for Indians, who by the Charter Act of 1833 had been declared to be equally qualified with Europeans for holding "any place, office or employment under the Company," to compete for these appointments, and it has been availed of for that purpose by Indians. But the examination being held in London, very few Indians can present themselves at the examination and thus the composition of this service has remained on the whole European. To secure entry by qualified Indian into the reserved appointments, rules were framed under an Act of 1870 with a view to giving a sixth part of the reserved appointments to Indians. As subsequently modified, these rules have led to the organisation of a Provincial Civil Service, carrying much lower salaries, specially qualified members of this service being promoted to fill the proportion of reserved appointments mentioned above, but on lower salaries. For recruitment to the Provincial Civil Service, a system mainly of competition, but combined with an element of nomination intended to provide careers to members of backward communities (who must be shut out if a wholly competitive test were employed), was tried for some time but has now been definitely abandoned in favour of a system of nomination. But the abuses inherent in such a system are sought to be provided against by framing rules intended to secure impartiality of selection and the possession of a minimum of educational qualification.

"Reserved appointments".

Theoretically, but not in practice, open to Indians

The Provincial Civil Service,

21. It has to be noted that the restrictions on the discretion of Government in regard to the "reserved appointments"

In the "Non-Regulation Provinces."

have no application to the Non-Regulation Provinces of the Punjab, Oudh, Central Provinces, Assam and Burma and the Government has thus been able to entrust a considerable share in the higher branches of the civil administration of these Provinces to military officers belonging to the Staff Corps and to others.

Special  
services.

22. Besides the Executive and Judicial Services, which are generally spoken of as constituting the Civil Service of India, there are other services, similarly divided into a higher Imperial and a lower Provincial branch, and concerned chiefly with the technical departments of the Indian administration. In the Police and Forest Services, the higher appointments are filled by competitive examinations held in England, the examination for the latter being open to all classes without distinction of race, whilst that for the Police Service is confined to Europeans. The Superior Services in the Engineering, Telegraph and Education departments are recruited by nomination, as a rule from amongst Europeans. Certain high clerical appointments (*e.g.* in the Financial department) are filled up by competitive examinations held in India. But generally speaking recruitment to offices in India, for services other than those already mentioned, takes place by nomination, subject more or less to departmental rules and regulations. Appointments made in England to services other than the Indian Civil Service are all regulated by departmental rules framed by the India Office and not by statute. The Indian Medical Service (higher or subordinate) is organised on a military basis, and the members of the higher Medical Service are recruited by competitive examinations held in England. The higher civil medical offices are generally filled from reserves of the Indian Medical Service or of the Indian Subordinate Medical Department (a). I do not propose to go into details. The summary above given will suffice to give a general idea of the organisation of the services in India.

Present day  
tendency to  
check abuses  
of patronage,  
by statutory  
or adminis-  
trative rules.

23. From the above sketch of the conditions of recruitment to the Public Services prevailing in several countries,

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(a) For the conditions of the Services in India, see Strachey, *India: Its Administration and Progress*, Third Edn, Ch. VI; the Report of the Royal Commission on the Public Services in India appointed in 1912; also the India List and the India Office List published annually.

it seems apparent that "patronage" is now largely controlled or at least directed by law in all progressive countries. In the spirit which brought about this change, executive authorities even when left free to make appointments to offices at will proceed, in all well-ordered administrations, to lay down rules and principles with a view thereby to minimise the element of caprice and jobbery which, in the present state of public morality, seem inseparable from all distributions of patronage. There is apparently less scope for the beneficent application of law or legal methods in the other processes by which the executive makes its influence felt on the services. Direction and promotion of officials must remain on the whole extra-legal operations, though, as pointed out before, in the State governments of the American Union, executive direction has in fact been almost wholly replaced by direction by statute, and promotion in many services in all countries takes places almost mechanically in the order of seniority, not indeed by force of law but of almost invariably followed office practice. As to removal of officials, public interest does not demand that it should be regulated by law in the same way as appointments to offices. In this matter it seems to be much more preferable that individual officials should occasionally suffer from wrongful dismissal, rather than that incompetent or dishonest officials should be allowed to retain possession of their offices against the public interest under a claim of vested right. It does not of course promote public interests, to make the tenure of public offices too uncertain, but the executive may generally be trusted to strike the proper balance between public interest on the one hand and justice to individual officials on the other. The practices of nations do not however agree even in this matter. The English law has refused to admit that appointed officials have a vested interest in their offices, and ordinarily all Crown appointments are terminable at pleasure. The rule is the same in France and also in the United States except where by statute the consent of another authority such as that of a council or upper chamber is required to be taken by the dismissing authority. There are however important exceptions to this rule *e.g.* in regard to offices the incumbents whereof can be dismissed only for a cause or hold office during good behaviour. In Germany and Austria, it will be remembered, no officer possesses arbi-

Direction and promotion of officials must be left largely to executive discretion as also removal.



trary powers of removal. Nearly all officers are appointed for life or for fixed terms and can be removed only as the result of a conviction of a crime or of the decision of a disciplinary tribunal (a).

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(a) Goodnow, *Comparative Administrative Law*, Vol. II, Book IV, Ch. VI ; Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 295-297 and Vol. II, pp. 78-79. Also, *infra*, Lecture XVIII.

## B. LEGAL RELATIONS.



### LECTURE XIII.

#### OF THE STATE (a).

##### *(I)—Introductory.*

1. In the survey of administrative organisations just concluded, I passed incidentally under review a number of functionaries each possessing rights and privileges and owing duties so distinctive in character as, for all practical purposes, to constitute a special status. In analysing the administrative organisations of the several countries, it became necessary frequently to refer to these relations by themselves. These functionaries may be enumerated in the order I propose to deal with them as follows :—(i) The Supreme Executive, (ii) The Legislature, (iii) The Judiciary, (iv) Ministers and Heads of Departments, (v) Officers generally, (vi) Persons in Military and Naval services, (vii) Local and other Public Corporations.

Legal relations of functionaries.

Functionaries classified for this purpose.

2. The above enumeration of authorities however omits one whose presence is apt to be overlooked for the very reason that it pervades the whole administrative system. This is the "State" (a), regarded as a legal entity. It will be convenient in this examination of legal relations to begin with the "State" and then pass on to the other authorities in the order specified above.

The "State" as a subject of legal rights and duties.

##### *(II)—Legal Relations of the State (a).*

3. The theoretical objections to regarding the State as a juristic person capable of entering into legal relations with its subjects and suing and being sued upon contracts and for torts and other matters in its own courts may not be altogether negligible. If the State be conceived as the whole people

Can Government be a litigant in its own courts?

(a) The proper term to use would have been "Government" and not "State" (*vide* distinction drawn in the opening lecture). But the use of the term "State" interchangeably with "Government" in the present connection is so common that to use another term in the heading would have savoured of pedantry. The terms "State" and "Government" are used interchangeably in this lecture to mean "Government."

incorporated into a commonwealth, some minds may see irreconcilable antinomy in the whole suing, or being sued by, one of its members. In law, however, the personality of a corporation aggregate is different from the personality of each of its living members. To others it might appear unthinkable that the Sovereign authority should be capable of being sued in courts which owe their existence to it. But the "Government" or the administration, as I have shown before, is not the "State" in the proper sense of the term (as meaning the power behind the Government), nor is it composed of the whole people, and there can be no logical difficulty in conceiving of the executive Government as a corporate unity separate and distinct from the subjects and capable like them of holding property, of entering into many varieties of legal relations and of suing and being sued not in *its* but in the State's courts.

A practical answer to a practical question.

4. But whatever may be the right or the wrong of theories, the logic of facts pays but scant regard to them. All Governments have to own properties, all have to borrow money. Modern Governments, almost against their will, are getting interested in business transactions of an industrial or commercial character. State-ownership is no longer a nightmare to disturb the repose of conservative politicians. It is already in a large measure an accomplished fact in most progressive administrations. The world may never see the day when Government will be the exclusive owner of all land and all capital. But to ignore the fact that governments to-day possess in many relations all the characteristics of private persons, with powers as such of acting well or ill far exceeding the capacity of the strongest and the richest of private individuals and corporations, is bad logic and worse policy.

Recognition of the juristic personality of the State obtained on the Continent of Europe, but not in England.

5. The principal difficulty that has stood in the way of a general recognition of this fact and of fitting it into the legal systems of nations has arisen from the Medieval monarchical doctrine of Western Europe: "The King can do no wrong", and the identification of the King with the State. I shall show later on that the immunity of the Chief Executive in England is not altogether an accidental historic freak. It has a basis of political wisdom which lifts it to the level of an administrative norm of capital importance (a). But the

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(a) See the next lecture (XIV).

identification of any single person with the State must now be regarded as a passing (though possibly at one time a necessary) phase in political evolution.

6. The idea that the State is a juristic person has made unequal progress in different countries. On the Continent of Europe, the Government, originally identified with the person of the King, has been already placed on the same footing as an ordinary corporation, "it being called "Fiscus," being made a subject of private law and entering into almost all private legal relations (a). But in Anglo-Saxon politics, the old theory still lingers to deprive subjects of important safeguards against tortious and negligent acts of Government and its agents.

7. The late Mr. Maitland, in the course of an illuminating essay on "The Crown as a Corporation" (b), has shewn in what devious ways and by what varieties of subterfuges the essentially corporate character of the body politic of England has been sought to be impressed upon the constitutional system of that country in the face of the ruling legal theory that the King is the State. Lawyers of the time of Coke declared the King to be a "corporation sole"—a legal conception which brought him into line with various holders of ecclesiastical appointments. Mr. Maitland has shown how barren of legal results, this attempt to incorporate the Commonwealth, by "parsonifying" the King, has proved to be. The practice commonly adopted by English constitutional lawyers of distinguishing the King in his public relations as the "Crown" seeks only to disguise a patent defect of the existing legal theory. The fact, Mr. Maitland has said truly, has now to be frankly recognised that our Sovereign Lord is not a "corporation sole" but the head of a complex and highly organised corporation aggregate of many—of very many.

Mr. Maitland on the failure of English law to recognise the corporate character of the State.

King viewed as corporation sole—a futile substitute of the true theory

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(a) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 150, 161-162. The idea is borrowed from Rome. At the commencement of the Principate, the "New Imperial Treasury," as distinguished from the "Old State Treasury" (*Aerarium Saturni*), was regarded as a purely private purse and cases affecting it went before the ordinary courts (the *Prætor* in Rome and the Governor in the Provinces). Later on, jurisdiction in all cases relating to the "Fiscus" was delegated to the procurators, the Emperor's financial agents. See Mattingly, *The Imperial Civil Service of Rome*, pp. 109-110.

(b) 17 *Law Quarterly Review*, p. 131.

Lack of a scientific theory partially supplied by positive rules of law or practice in Anglo-Saxon countries.

8. This recognition, long overdue, is of course still to come. Meanwhile I must content myself with detailing the several ways in which the inherent defect of the legal theory has been at least partially remedied by constitutional practice, legislation and legal decisions in England, the United States of the America and in the Colonies and Dependencies of the British Empire.

When State may be impleaded in courts under English common law.

9. The following is a reliable summary of the circumstances in which the State may find itself impleaded in its courts under the common law in Anglo-Saxon countries: "It is a principle of both the Civil and Common law, that a Sovereign State or the Sovereign representing such State may call into exercise the judicial functions of its courts by instituting suits therein against any party over whom the courts can exercise jurisdiction, and by comity such State or its Sovereign in its behalf may be allowed to maintain suits in the Courts of other Sovereign States, but that on the other hand such State or its Sovereign in his public capacity cannot be sued in its courts, nor in the courts of any other Sovereign State. The Sovereign State may as a matter of grace allow questions of its legal liability to be determined by its courts" (a).

It can sue as of right.

But is suable only by permission.

Remedy against State by Petition of Right in what cases available in England.

10. "As a matter of grace," the Crown of England has now for several centuries been permitting subjects to apply by "Petition of Right" for redress in all cases of breaches of contract, for recovery of lands or other corporeal hereditaments, of incorporeal hereditaments, of chattels real, of specific chattels and perhaps of their value, if collected, and of money claims in general. Amongst money claims arising otherwise than under contracts for which a petition of right is available may be specified claims for payment for services rendered, for the personal estate of deceased intestates, for dues and duties of all kinds which have been paid to the Crown, for compensation for land taken by the Crown, for pensions, for sums alleged to be due by the Post Master General, for claims relating to naval prize and for claims relating to colonial stock or any dividend thereon (b).

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(a) Emlin McClain in the *Cyclopedia of American Government*. Title, "States as Parties to Suits."

(b) See Halsbury, *Laws of England*, Vol. X, pp. 27-29. It follows necessarily from the premises that no specific relief can be had against the

11. But since the King can neither do nor authorise a wrong, a petition of right will not lie for damages for a tort alleged to have been committed either by the Crown or by a servant of the Crown acting by the Crown's authority. On this principle a petition of right will not lie for the alleged infringement of a patent by the Crown or its servants, but in a proper case the Crown has sometimes agreed to be bound by the result of an action for infringement brought against one of its servants. Where a claim is on the border line between contract and tort, it has been usual for the Crown to grant the *fiat* conditionally in order that the matter may be discussed, and take its objection by demurrer on the pleadings.

Petition of right does not lie for torts of Government or its agents.

12. The *fiat* of the Crown without which no petition of right can be set down for trial is the distinguishing ceremony which marks off these proceedings from those of ordinary courts, and English constitutional writers affect to believe that the King may grant or refuse his *fiat* at his pleasure. It is generally believed however that it is the duty of the Attorney General to advise the Crown to grant its *fiat* to all petitions except those which are frivolous. The *fiat*, thus eloquent of the theory of "grace and favour," may be granted to the whole or a part of the petition and may be either absolute or qualified, and the qualification may be of any nature, either forming part of the actual *fiat* or consisting of an intimation given when the petition is returned to the suppliant with the *fiat*. A petition of right cannot be amended unless a fresh *fiat* is obtained to the amended petition (a).

The *fiat* and its significance.

13. The remedy provided by petition of right, assuming that a *fiat* has to be granted as a matter of course on all petitions of the descriptions mentioned above, is nevertheless so wholly inadequate, that English constitutional lawyers have been forced to restrict the operation of the maxim, "the King can do no wrong", by coupling it with another to all appearances its contrary, that a servant of the Crown cannot plead royal authority in defence to an action for tort by a subject for wrong done under colour of office. "The civil irrespon-

For torts, agents of Crown personally liable.

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Crown even in respect of contracts—the coercive jurisdiction of the courts, of common law as well as of equity, against the State being wanting.

(a) Halsbury, *Laws of England*, Vol. X, pp. 31, 33.

How this  
may make  
State res-  
ponsible in-  
directly.

sibility of the supreme power" for tortious acts, said the Privy Council, "could not be maintained with any show of justice, if its agents were not personally liable" (a). Whether, when a public servant has been mulcted in damages at the instance of an aggrieved subject for acts done *bona fide* and in obedience to orders from responsible superiors, he may petition the Crown for indemnity, may be open to question. But such indemnity, it may be assumed, is invariably given in all suitable cases. The subjects of His Majesty in England may therefore claim that even under existing constitutional theory they can make the Crown indirectly pay for the torts of its servants committed in the course of their appointed duties in most cases, and the servants themselves personally in all cases.

Remedy  
more restric-  
ted in  
America.

14. But even this indirect remedy has been in a large measure denied in the United States of America. "If", says the writer in the *Cyclopedia of American Government* previously quoted, "the practical result of a suit against officers and agents of a State is to restrict it in the exercise of its lawful powers, then it cannot be maintained. On the other hand, it is held that if in suits against persons who claim to act under State authority, the authority itself on which they rely is not valid, then it furnishes to them no defence." At one time indeed, in that country, the whole remedy by petition of right was in jeopardy, for when the American States declared their independence and proclaimed republican forms of government, who, in the absence of the King, were petitions of right to be addressed to, in a republic? The practice arose of appealing to the legislature and that is still the only remedy open in most of the States. But the Federal government has by a Statute of 1855 established a "Court of Claims" at Washington with jurisdiction to entertain all claims founded on the constitution, a statute of the United States, a regulation of the executive department or any contract express or implied. The Court has thus no jurisdiction over the Government's torts. More recently, to obviate the necessity of people of distant States having to lay their claims before the Court in Washington, District Courts have been given concurrent jurisdiction in claims of 10,000 dollars or under (b).

On the estab-  
lishment of  
the republic  
petitions of  
right lay to  
legislatures.

Court of  
Claims and  
Federal Dis-  
trict Courts  
now entertain  
claims against  
Federal Ad-  
ministration.

(a) *Rogers v. Rajendro Dutt*, 8 M. I. A. 103 at p. 130. (1860).

(b) See *Cyclopedia of American Government*, Title, Court of Claims.

15. A petition of right, it is said, does not lie in England in respect of land which does not lie in that country, except when it is vested in the Crown for Imperial purposes or in the Local Government (a). The statutory remedy provided by the Government of India Act of 1858 against the Secretary of State for India in Council has, so far as India is concerned, displaced the remedy by petition of right in respect of property detained or contract broken in India (b). The apparent loss, as I shall show presently, was a real gain to India, for the Government of India can be sued not only on contracts but also for torts. Colonial statutes have, in some colonies, made provisions for allowing proceedings equivalent to a petition of right being taken in cases even of torts against the Crown and its representatives (c).

No petition of right necessary in India and certain British colonies where remedy by suit available under statutes.

Statutes providing for proceedings against the State in British colonies and in the United States of America fall into two classes. Those in the first class create or define particular rights and provide remedies for their enforcement. "Thus", says an American writer in a recent number of the *Harvard Law Review* (d), "at Panama, where all realty and most of the personalty are public property, the United States solved the problem of Sovereign's liability with a series of Workmen's Compensation Acts. In substance, Massachusetts was suable on tort claims arising from its management of the Troy and Greenfield Railroad and the Hoosac. By statute, New York has long been responsible for negligence in connection with its canals, and Ohio has a similar law. Canada gives legal remedies for injuries caused by negligence in public works. A like statute has been passed by West Australia. New Zealand makes the Crown pay for damage suffered in connection with certain public works from which

Statutory actions against the State in British colonies and the United States classified.

(i) Remedy given in special cases.

In *United States v. Jones*, 131 U. S. 1 (1889), the Supreme Court held that the statutes establishing those Courts did not authorise them to entertain claims for specific performance against the State ( *Miller and Field*, JJ., dissenting ).

(a) *Halsbury, Laws of England*, Vol. X, p. 28.

(b) *Frith v. Reg.* L. R. 7 Ex. 365 ( 1872 ) ; *Doss v. Secretary of State for India in Council* L. R. 19 Ex. 509 ( 1875 ) and *Reiner v. Marquis of Salisbury* L. R. 2 Ch. D. 378. ( 1876 ).

(c) *Halsbury, Laws of England*, Vol. X, p 29.

(d) John M. Maguire on "State Liability for Tort," 30 *Harvard Law Review*, pp. 24-25.



revenue is derived. Such laws suggest the decisions of the French administrative courts respecting *travaux publics*."

(ii)  
General right  
to sue given,  
how restric-  
ted by inter-  
pretation.

No remedy  
in respect of  
"govern-  
mental  
acts."

The second class of legislation does not deal at all with particular rights, but purports to give private claimants a general judicial remedy against the Sovereign. "Statutes of this kind", according to the same writer, "are common in the British colonies and exist in at least nine of our States" (a). Courts of law, almost everywhere, have however acted very timidly in interpreting such provisions. "Language used in different jurisdictions varies, but the underlying idea seems constant. No sovereign or governmental act, however ill performed or damaging, is a State tort." It is the trail of old doctrine—the King can do no wrong. It reappears in these decisions in Continental disguise and operates, in the result, in conferring on the Government in Anglo-Saxon countries a degree of immunity not permitted to it by Continental administrative law. "The tendency in the United States at least," adds Mr. Maguire, "is to make this rule cover a multitude of sins. Of course, it extends to acts of the legislature and of the judiciary, police activities, and acts of war. Miscellaneous instances of its application are found in the construction and maintenance of prisons, hospitals, and educational institutions ; care of public roads and parks ; protection and propagation of fish and game ; operation of vessels in harbor-work and fire-fighting (m)."

(a) The method usually followed in the colonies is to appoint an officer to sue and to be sued on behalf of the Crown. This itself appears to be an extension of an English practice, declared in *Dyson v. Attorney General* (1911) I.K.B. 410, to have been settled for centuries, permitting the Attorney General to be sued in courts of equity on behalf of the Crown, when the relief asked is not a direct order against the estate of the Crown but touches its interests only indirectly. In the former case the remedy, if any, is of course by petition of right. The equitable remedy has been turned to good uses recently in order to compel Government departments to act in compliance with the law in their rapidly growing dealings with the affairs of the people directly and without the intervention of courts of law. See *Hodge v. Attorney General*, 3 Y. and C. Ex. 342 (1835), and *Deane v. Attorney General*, 1, Y. and C. Ex. 197 at p. 208 (1835), *contra*, Mitford on Pleadings, p. 30. But the practice has been recently approved by a panel of the Judicial Committee of the Privy-Council in *The Eastern Trust Company v. McKenzie Mann & Co. Ltd.* (1915) A. C. 750 at p. 759 ; 20 C. W. N. 457 at p. 461. See *infra*. Lecture XXIII, para 27.

(b) "State Liability for Tort," 30 Harvard Law Review, pp. 25-27.

18. The immunity, contrary to the spirit of English law, has in America been extended to boards, corporations and other instrumentalities performing public functions (a). Immunity extended in America to boards and corporations.

19. On this point, Scotch law and practice may perhaps give points to Anglo-Saxon law as it has been developed in England and in the United States, for in that country, actions, suits or proceedings on behalf of or against or in the interest of the Crown or on behalf of or against any public department may lawfully be raised in the name and at the instance of, or directed against His Majesty's Advocate, for the time being, as acting under the Crown Suits (Scotland) Act 1857, provided that before instituting or defending any such suit or proceeding the Advocate has the authority thereunto of His Majesty or of the public department on whose behalf or against whom the suit or proceeding is instituted. But no private party in suits or proceedings so instituted may challenge or impugn the instance of or title to defend the same upon the allegation that such authority has not been granted, or that evidence of the same is not produced. These provisions were not to affect the instance or defence of any action or proceeding instituted in conformity with the law as existing at the passing of the Act (b). Remedy in Scottish law.

20. I have in a previous lecture generally explained the legal position of the present Government of India as the successor of the East India Company, a private corporation, and its capacity to sue and be sued in Indian Courts, amongst others. The Government of India before 1858 was a body-corporate in the fullest sense of the term, like the colonial Governments of Massachusetts, Rhode Island and Connecticut. On the assumption in that year of the direct sovereignty of India by the Crown, the Government of India, now placed in the hands of a Secretary of State, was re-incorporated under the name and style of "the Secretary of State for India in Council." To be technically correct, the Secretary of State Remedy in India.

(a) The American cases are cited by Mr. Maguire at p. 27, foot-note (28), 30 *Harvard Law Review*. *Contra*, *Nersey Docks Trustees v. Gibbs*. L. R. 1 H. L. 93, 107; (1866).

(b) See Halsbury, *Laws of England*, Vol. VI, pp. 416, 417. It is said that Kings of Scotland were suable by their subjects and the statute of 1857 may therefore amount to no more than a legislative recognition of ancient Scottish tradition. See Maitland, *Constitutional History of England*, 1913. p. 482.

for India in Council was made a body corporate for suing and being sued in courts, but not for holding property, for all property formerly vested in the East India Company is now vested in the Crown ; but, as I took pains to show, substantially the Secretary of State for India in Council is a body corporate for the purpose of holding property as well as for suing and being sued in courts ; and every person has now the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Acts of 1858 and 1915 had not been passed (a).

What the  
East India  
Company  
could be sued  
for.

Acts done by  
it in the exer-  
cise of dele-  
gated sove-  
reign power.

21. The East India Company, as a private corporation would have been answerable in courts of law on its own contracts and on contracts made on its behalf and for torts committed by it or by its agents or servants acting within the scope of their authority. But the East India Company was a great deal more than a private trading corporation. It had certain sovereign functions delegated to it by the Crown (b). But that did not make the Company sovereign and entitled as such to all the exemptions of a sovereign (c). Could the East India Company claim exemption in respect of torts committed in the discharge at least of its governmental functions ? Most officers and servants of the Crown discharge similar functions. But as to these, the law clearly is that "if a British subject suffers damage from a British act of State unauthorised by Parliament and outside the constitutional limits of the Royal prerogative, he has a right of action against the officer by whom the act was performed even if it was expressly authorised by the Crown or the Government" (d). The immunity of the East India Company could not, according to English law, be any greater, the party aggrieved being a British subject. Even if the East India Company could have been viewed as a public body, the position would have been just the same (e). In no circumstance could the East India Company be viewed as a

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(a) See *supra*, Lecture V, paras 71-73 ; Government of India Act of 1858, sec. 65, now sec. 32 of the Government of India Act of 1915.

(b) *Gibson v East India Company*, 5 Bingham, N. C. 262, 273 (1839).

(c) *P. & O Co. v. Secy. of State*, 2 Bourke 166, at p. 168 (1861).

(d) Halsbury, *Laws of England*, Vol. XXIII, p. 309, *Walker v. Baird* (1892) App. Cas 491 (1892).

(e) *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, 107 (1866).

Government department or a superior public servant (a). It would therefore be liable for the torts of its servants even when committed in the discharge of distinctly public functions ; and the rule of English law that a Government department, a public officer or a servant of the Crown cannot be made liable for the acts of his subordinates (b) would not be available in its favour. The Secretary of State for India in Council is, however, a department of the Home Government, and, sec. 65 of the Government of India Act of 1858 apart, the transference of the government of India from the East India Company to the Crown would have immediately resulted in depriving British Indian subjects of all the legal remedies until then available to them against the East India Company for torts committed by public servants. As it was, however, the Act of 1858 not only saved this right of action against the Government of India but even made it inviolate by erecting it into a right which no legislative measure passed in India can take away (c).

Claim of immunity in respect of such acts at the suit of a British subject, not sustainable on principle.

22. I have tried here to set out what appears to me to be the logically worked out consequences of English precedents upon the position of the Government of India as defined by the statute of 1858. But judicial interpretation of the provisions of the statute, in India, appears again and again to take a decidedly American turn. The Government of India, we are told, cannot be held responsible in courts of law for the consequences of acts done "in the exercise of what are usually termed sovereign powers" and sec. 65 of the Government of India Act of 1858 only saved actions in respect of acts done "in the conduct of undertakings which might be carried on by private individuals without any sovereign powers delegated to them" (d). In the latest of these decisions, *Secretary of*

Indian decisions to the contrary of questionable authority.

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(a) *In P. & O. Co. v Secy. of State*, it was definitely laid down that the East India Company were not public servants of Government, 2 Bourke 166 at p. 168 (1861).

(b) Halsbury, *Laws of England*, vol. XXIII, p. 322. This is an obvious proposition since both superior and subordinate officials are equally servants of the Crown and not one of the other.

(c) *Secy. of State v Moment*, L. R. 40 I. A. 48 : I. L. R. 40 Cal 391 : 17 C. W. N. 169 (P.C.) (1912).

(d) *Nobin Chandra Dey v. Secy. of State*, I.L.R. 1 Cal 11 (1875) ; *Ross v. Secy. of State*, I.L.R. 37 Mad 55 (1913) ; *Secy. of State v. Cockcroft*, I.L.R. 39 Mad 351 (1914) ; *McInerney v Secy. of State*, I.L.R. 38 Cal 797 (1914).

*State v. Cockcraft*, American authorities are in fact freely cited, without advertence however to the important departure they have on this point made from English law.

Defence that act complained of "act of State" when admissible according to English constitutional law applicable to India.

23. In arguing against the existence in favour of the East India Company (and consequently in favour of the present Government of India) of any special immunity in respect of the torts of its agents on the ground of its possessing sovereign powers and on the ground of such agents having been equally with the Company the servants of the Crown, I do not overlook cases like the *Nabob of Carnatic v. The East India Co.* (a), *Secretary of State for India v. Kamachee Boye Sahaba* (b), *Coorg v. East India Co.* (c), *Salaman v. Secretary of State* (d), *Bhagwan Singh v. Secretary of State for India* (e) and *In re: Maharaja Madhava Singh* (f). In all these cases, the acts complained of arose out of dealings by the East India Company or the Government of India or its agents with foreign princes and not with British subjects. According to English law, if an alien suffers damage from a British act of State outside the jurisdiction, he has no right to redress unless such a right has been expressly conferred by statute (g). In *Buron v. Denman* (h), the Captain of a British man-of-war proceeding to the Gallinas (West Africa) to release two British subjects there detained as slaves, concluded a treaty, fired certain premises belonging to the Plaintiff, a Spanish subject, and carried away and released his slaves. The Captain's proceedings were subsequently approved by the British Government. Plaintiff's action for damages against the redoubtable Captain was thrown out by the court on the ground that

(a) 2 Vcs. Jr. 56 (1793).

(b) 13 M.P.C. 22 (1859).

(c) 29 Beav. 300 (1860).

(d) (1906) 1 K.B. 613 C.A.

(e) L.R. 2 I.A. 38 (1874).

(f) 8 C.W.N. 841 P.C. (1904). Even judicial acts performed by the agents of the Government of India in the Native States under treaty or other rights of a similar nature are acts of State, *Hemchand v. Azam Sakarlal*, 10 C.W.N. 361 P.C. (1905). On the other hand, the Governor of Madras in Council acting judicially in disputes arising between British subjects does not exercise sovereign powers within the meaning of these cases, *Sri Vikrama v. Gunapiram*, 9 C.W.N. 257 P.C. (1904).

(g) Halsbury, *Laws of England*, Vol. XXIII, p. 309.

(h) 2 Exch. 167 (1843).

the ratification of the Captain's act by his Government made it an act of State for which no action could be maintained. This decision is no authority for holding that a breach of law by a public servant from which a British subject suffers injury can be defended on the ground of its having been an "act of State." Neither previous sanction nor subsequent ratification by the Government would make what is illegal legal, in the view of English law. In *Secretary of State for India v. Cockcroft* (a), the last of the Indian decisions mentioned above, the Plaintiff, a British subject, sued the Government of India for damages for injuries sustained by him at a carriage accident alleged to have been due to the negligence of the servants of the Public Works department in maintaining a public road. The ground on which he was nonsuited was that the provision and maintenance of a public road, specially a military road, were functions which the Government performed in the exercise of its sovereign powers and were not undertakings which might have been carried on by private individuals. Neither this nor the decision of Fletcher, J., to the same effect in *McInerney v. The Secretary of State* (b) can be supported upon principles of English law applicable to India, though it may not be difficult to find American precedents for them.

No immunity for "governmental acts" which are not "acts of State" strictly so called.

24. The American distinction between the public, sovereign, governmental functions of a public corporation and its proprietary, commercial, money-making functions finds parallels in Continental and not in English administrative law. French administrative law, for instance, draws a distinction between (i) "personal" acts of public servants for which the latter alone are liable and before ordinary courts and (ii) "acts of administration," for which—provided they are not acts done in the exercise of political authority by the State over citizens (of which presently)—the State accepts responsibility, and compensates the injured citizens out of the revenues of the State. "Acts of administration" giving rise to claims by private subjects may arise out of contracts, torts or even bad service. The public officer himself cannot be sued in damages for an act of administration. It follows from this

Government suable on the Continent as *l'État* and also for "acts of administration," but not for "acts of government."

(a) I.L.R. 39 Mad. 351. (1914).

(b) I.L.R. 38 Calcutta 797. (1911).

What are  
acts of go-  
vernment.

that on the Continent not only does the State accept responsibility for its servants' torts, but obviously also for many acts which do not concern the State in its proprietary, commercial and money-making capacity only (a) (to quote the language of American decisions), or which, in the language of *Nabin Chunder Dey v. Secretary of State for India* (b), do not concern undertakings which might be carried on by private individuals without having sovereign powers delegated to them. But all liability is excluded for (iii) "acts of government", the boundary line between which and acts of administration may be difficult to define with exactitude. "Acts of government" are said to be acts done (whether within the legal power of the Government or not) for reasons of State with a view to public safety. These can neither be annulled by any judicial process nor create a claim for compensation against the State or its officials. "Not unnaturally," says Lowell (c), "the kinds of acts that have been regarded as falling within this class has not always been the same. Under the Second Empire, the arbitrary suppression of a newspaper, and the confiscation of the proof-sheets of a book written by the Duc d'Aumale about the princes of his house, were held to be "acts of government", while under the Third Republic, in cases closely similar to the latter and in a case involving the seizure of a political circular in favour of the monarchy, the decisions were the other way. The prevailing opinion at present is that the exemption afforded by the principle covers only measures taken to secure external safety or to carry on a war, decrees creating the state of siege, with perhaps some matters of sanitary police, and does not cover other steps taken by the Government for the preservation of order.

"What are  
"acts of ad-  
ministration?"—They  
cover "pri-  
vate law" as  
well as "poli-  
tical" acts of  
Government.

25. In contrast with acts of government, acts of administration have been sought to be distinguished as (i) acts done in the State's business dealings with citizens, acts by which the State is supposed to enter into private law relations with

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(a) For acts done by the State (or its agents) in its capacity as *fiscus*, the State is directly suable in France in administrative courts and in Germany in ordinary courts. Goodnow, *Comparative Administrative Law*, Vol. II, pp. 161-2.

(b) *I. L. R.* 1 Cal 11. (1875).

(c) Lowell, *Government of England*, Vol. II, p. 500.

citizens (a) and (ii) acts done in the exercise by the State of its political authority over citizens (b). The theoretical justification for impleading the State in its courts in respect of the first-mentioned group of acts is that in its business relations the State acts as a private juristic person. Consistently with this theory, suits in respect of such acts should lie, as they do in Germany, like any suit between private individuals, in the ordinary courts. In France however, much the largest part of of this jurisdiction has been transferred to administrative courts, which entertain complaints in regard to both varieties of acts. Matters arising in the management of State domains and questions of indirect taxes and those relating to lesser highways and several other subjects still come before the ordinary courts, but most matters involving enquiry into the conduct of officials come before administrative courts. It should be noticed further that the first group of acts, called in France "*actes de gestion*," gives rise to pecuniary liability and can be brought only by persons whose rights have been infringed, but for the second group of acts called "*actes d' autorite*," which covers on the whole acts done in the exercise of the political right of the State to issue ordinances, ordinarily no claim to damages arises. Ordinances can be annulled by the Council of State in its panel as the highest administrative court at the instance as well of persons whose rights have been affected as of others who are only interested in having them annulled. It is necessary also to note that relief is given not merely in cases of officials acting in excess of authority (whether the act is regarded as the "personal" act of the official concerned or as an "act of administration") but in cases also of unconscientious exercise of legal authority—for abuse of legal power, in other words (c).

In what cases  
pecuniary  
claims arise.

Relief for  
abuse as well  
as over-step-  
ping of  
authority,

26. It will be seen from a comparison of Continental and American law on the point, that the latter operates more

A compara-  
tive estimate  
of American  
and Conti-  
nental law—  
the former far  
less liberal  
than latter.

(a) In French nomenclature these are called "*actes de gestion*."

(b) In French nomenclature these are styled "*actes d' autorite*." See Lowell, Government of England, Vol. II, pp. 496-500.

(c) This in the language of French administrative law is called "*detournement de pouvoir*," for instances of which and for the subject generally see Lowell, Government of England, Vol. II, Ch. LXII and Goodnow, Comparative Administrative Law, Vol. II, Book VI, Ch. II, Sec. I, Subsec. 3 and Ch. VI, Sec. IV.



harshly upon the subject than the former, since according to the latter, though public corporations may be made liable for torts committed in relation to their business or private law relations, the State itself (as in England) is immune when similar torts are committed by public servants in performing similar functions ; whilst as regards what may be regarded as governmental acts the State and public authorities of all grades from the highest to the lowest enjoy equal immunity—the American definition of the scope of governmental acts being moreover decidedly wider than what is implied in the French definition of “acts of government”. American law appears indeed to go even further—holding, as it is said to have done, that what are called quasi-corporations, being agents of Government, share (except as otherwise provided by statute) the immunity of Government for all acts done by them as such whether these arise out of the State’s public or private law concerns (a).

Indian law as erroneously interpreted in some decisions less liberal even than American or English law.

27. As I have previously indicated, the legal position assigned to the Government of India in several Indian decisions bears a close resemblance to the position assigned by American law to public corporations in the United States. In these decisions, the liability of the Government of India is sought to be made to depend upon whether the act in question could or could not have been done by a private individual without delegation to him of sovereign powers. If the former, the Government would be liable. The scope thus given to what in India, from the point of view of these decisions, would seem to correspond to the “acts of government” of Continental administrative law, appears to be even wider than what American law views to be the public functions of public corporations. The principle laid down in *Nobin Chunder Dey v. Secretary of State* (b), if it is as strictly applied everywhere as it was in *McInerny v. Secretary of State* (c) and *Secretary of State v. Cockcraft* (d), would really secure to the Government of India a degree of immunity greater even than that enjoyed by the Crown in England, for according to the decision in

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 152.

(b) I. L. R. 1 Cal 11 (1875).

(c) I. L. R. 38 Cal 797 (1911).

(d) I. L. R. 39 Mad 351 (1914).

*Nobin Chunder Dey v. Secretary of State* the immunity extends even to cases of contracts entered into by the Indian Government in the public interest (a) for which a petition of right would obviously lie in England—a result which sec. 65 of the Government of India Act of 1858 could hardly have been expressly framed to perpetuate. That being so, I feel no doubt that Turner, C.J., of the Madras High Court acted rightly in refusing to follow *Nobin Chunder Dey v. Secretary of State* as a precedent in *Secretary of State v. Hari Bhanji* (b). He stated the law correctly when he said that “acts of State, of which the municipal courts of British India are debarred from taking cognisance, are acts done in the exercise of sovereign powers which do not profess to be justified by municipal law, and where an act complained of is professedly done under the sanction of municipal law and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil court.”

Indian law correctly interpreted really more liberal than Continental or English law.

28. This being the state of the law in the several administrative systems passed under review, are there reasons of policy which would justify the tendency exhibited independently in several systems to confer on the Government varying degrees of immunity in respect at least of its servants' and agents' torts? For torts committed by its employes within the scope of their employment, the liability of *private* corporations, under English law, is materially restricted by the rule that the wrongful act must not arise out of proceedings which are themselves altogether *ultra vires* of the corporation (c). Must the State alone be held to be an insurer for

Is the English law immunity of State for torts justifiable on grounds of policy?

(a) Such for instance as loans for carrying on war.

(b) I. L. R. 5 Mad. 273 (1882). See also *Jehangir v. Secy. of State*, 6 Bom. Law Reporter 181 (1903), on appeal from the judgment of Tyabji, J. in I.L.R. 27 Bom. 189 (1902). The judgments of Batty and Jacob, JJ., overruling Tyabji, J., on this point, particularly that of the former, deal with the matter both cogently and exhaustively. That is hardly what one can say of the judgment of Chandavarkar, J., which is extraordinarily full of fallacies.

(c) *Poulton v. London and South Western Railway Co.*, L. R. 2 Q. B. 534, (1861), *Green v. London General Omnibus Co. Ltd.*, 29 L. J. C. P. 13. Cf. *Goff v. The Great Northern Railway Co.* 3 E. and E. 672 (1861) But the recent decision in *Campbell v. Paddington Borough Council*, [1911] 1 K.B. 869, appears

damages resulting from *all* wrongful acts, without distinction, of a public servant done in relation to his office? I have elsewhere indicated how, assuming as the minor premise the proposition that the State can neither do nor authorise a wrong, and treating the State as a corporation, it might be argued that all wrongs committed by the servants of Government are *ultra vires* of the State, and that therefore the servants personally and not the State should be held accountable in damages. The argument proves altogether too much. It throws doubt upon the soundness of the proposition set out above as the minor premise (a). Persons in England as well as in America who can speak with authority are not disposed to accept that proposition as a necessary postulate of constitutional law. "It is a wholesome sight," said Maitland, to see the Crown sued and answering for its torts" (b). "It is difficult to see", said Miller, J., "on what solid foundation of principle, the exemption from liability to suit rests" (c). Mr. Maitland, I feel sure, would not have approved of the way in which the beneficent provision of sec. 65 of the Government of India Act of 1858 has been sought to be nullified by decisions like *Secretary of State for India v. Cockcraft* (d) and *Shivabhajan v. Secretary of State for India* (e).

Views of  
Maitland and  
Miller, J.

No real  
ground for  
apprehending  
serious conse-  
quences from  
admitting  
such liability.

29. Nevertheless it is not pleasing to contemplate the indiscriminate application of public money to private relief, wherever the damage caused is made to appear as the consequence of an illegal act of a public servant. But the apprehension that a general recognition of the liability of the State in tort for the wrongful acts of its servants will encourage

to throw considerable doubt upon the correctness of the proposition. See H. A. Smith, *Law of Associations*, pp. 67-68.

(a) For instances of the application of the doctrine of *ultra vires* within more reasonable limits, see *Dunne v. Queen*, (1896) 1 Q. B. 116, *Tilor v. United States*, 9 Wallace 45 (1869), and *Mathradas v. Secy. of State*, 5 S. L. R. 82. On the other hand, Chandavarkar, J.'s judgment in *Jchangir v. Secy. of State*, 6 Bom. L. R. 131 (1903), illustrates the *reductio ad absurdum* of the text.

(b) See article, "State as a Corporation," in 17 L. Q. R. P. 131, at p. 142.

(c) *United States v. Lee*, 106 U. S. 196 (1882), at p. 206.

(d) I. L. R. 39 Mad. 351 (1914).

(e) I. L. R. 28 Bom. 314 (1904). In this case, strangely enough, the passage I have quoted from *Rogers v. Rajendro Dutt*, 8 M. I. A. 103 (1860), at p. 130, is taken as showing that the Government of India in the view of the Judicial Committee is "civilly irresponsible" !

raids by aggrieved subjects upon, the State treasury seems to me to be, to say the least, exaggerated, for not every act done by a public servant in performance of his public duties is necessarily viewed as an act done by him as an agent of Government. A public servant, though he generally owes his appointment to office to an executive act of the Government, may often find his duties chalked out for him by the legislature. In performing statutory duties for which the statute intends that he himself and no one else should be responsible, a public officer, it is said, does not act as the agent of Government. He is, in respect of such duties, said to be an independent statutory authority and not the servant of the authority which appoints him to the office (a). therefore, Government has only to persuade the legislature to prescribe the duties of officials by statute so as to make them, for the purposes of such duties, independent of itself, and its immunity is secure. And if, at the same time, the legislature is persuaded to grant immunity to the officials themselves for wrongful performance of those duties it will have placed the whole sphere of those duties outside the pale of law and within that sphere to have virtually abolished the rule of law. Instances where this has been done will be easily recalled (b). But in either case, should the Government adopt the act of the public servant or accept its benefits, it will, I presume, be open to the aggrieved individual to sue the Government, provided, of course, that the law of the country permits such actions to be brought against Government (c).

Not all public servants agents of Government.

30. So far as I have been able to ascertain, the Government of India is the only Colonial Government within the British Empire which is a body corporate, for the purpose at least of suing and being sued, by Parliamentary statute. "The Secretary of State for India in Council," as the body corporate is styled, does not own any property of its own for that is all vested in the Crown, but besides the fact that the disposal of that property and the revenue of India rests with the Secre-

Government of India a juristic person under statute.

(a) *Canterbury v. R.*, (1843) 4 St. Tr. N.S., 767, *Tobin v. Queen*, (1864) 16 C.B. N.S. 310 at p. 349, *Shivabhojan v. Secy. of State*, (1904) I.L.R. 28 Bom. 314, *Moti Lal Ghose, v. Secy. of State*, 9 C.W.N. 495 (1905).

(b) See *infra*, Lecture XVIII, paras 55-63, and Lecture XXII, paras 25-27.

(c) *Secretary of State v. Jagat Mohini*, 6 C.W.N. 175 (1901).

Can any act of a public servant in India be considered to be *ultra vires* of the Government?

Comments on *Shivabhanjan v. Secy. of State and Nabin Chunder Dey v. Secy. of State*.

tary State for India in Council, "the property for the time being vested in his Majesty for the purpose of the Government of India is liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company" (a). It is pertinent to enquire whether, the Government of India being a body corporate, it is possible to apply the doctrine of *ultra vires* alluded to above to its acts. The Government of India Act lays down statutory methods and forms for the performance of many of the acts of Government, but the powers of Government are virtually unlimited. That there is no room for the application of the doctrine, it will be rash to assert. But the question has not, so far as I am aware, been raised or discussed except in an indirect way in *Shivabhanjan v. Secy. of State* (b), and somewhat more directly in *Srinibas Prosad Singh v. Kesho Prosad Singh* (c). In the former case, Jenkins C.J. expressed an opinion that for a suit to lie against the Secretary of State for India in Council it must not only be one in which the East India Company might have been made liable, but that the liability alleged must further have been incurred on account of the "Government of India" within the meaning of sec. 42 of

(a) The language of the statute being that the Secretary of State in Council "can sue and be sued as a body corporate," Mitter, J., (Trevelyan J. concurring) was persuaded to hold in *Doya Narain v. Secy. of State*, I.L.R. 14 Cal. 258 (1886) at p. 271, that the statute did "not constitute the Secretary of State a body corporate," and following James, L.J., in *Kinloch v. Secy. of State*, L.R. 15 Ch. Div. 1 (1880), declared that "the Secretary of State for India in Council" was only a name. Of course, if you identify the Crown of Britain and the Government of India, "the Secretary of State for India in Council" and even "the Government of India" become names (see also *In re: Sir Stuart Samuel*, 17 C.W.N. 735 P.C. (1913)). But the whole scheme of the Government of India Act of 1858, which nominally converted the Government of India into a department of the Home Government, is to keep the revenue, the property and the business of the Government of India strictly separate from the revenue, property and business of the Government of the United Kingdom. As Mr. Maitland has pointed out all that is stated in that Act as to the revenue etc. of India being vested in the Crown is itself a solemn fiction ("The Crown as Corporation," 17 L.Q.R. 131 at p. 143). The fiction could not be dispensed with under the existing constitutional theory of the British Empire. But it does not disguise the fact that the Government of India is a real thing and not a name. The name "Secretary of State for India in Council" is the statutory title of the Government of India, which is a body corporate.

(b) I.L.R. 28 Bom. 314 (1904) at p. 323.

(c) 15 C.W.N. 475 (1911). See also *Mathradas v. Secy. of State*, 5 S.L.R. 82.

the Government of India Act of 1858, (now sec. 20 (2) (c), of the Government of India Act of 1915) that, is to say, (according to his Lordship) "for superintendence, direction and control of India." His Lordship did not pursue this line of thought further, as he was able to cut the knot in that particular case by assuming, first, that in *Rogers v. Rajendro Dutt* (a) the Judicial Committee was of opinion that the East India Company was in law "civilly irresponsible" like the Crown of England, and secondly, that the offending public servant in that case was not such an agent of the Government as would make the latter responsible for his torts. Had the argument just indicated been pushed to its logical consequence, the conclusion reached would probably have been just the reverse of that arrived at in the *Nobin Chunder Dey v. Secy of State* (b) and the other cases of its class, ending with the *Secy. of State v. Cockcraft* (c), which I have previously considered. According to these cases, the East India Company was not liable to action for anything done in discharge of its governmental functions but was so liable only for torts committed in reference to its proprietary, commercial or trading undertakings, whereas in the view of Jenkins, C.J., the Government of India cannot be sued for anything not done for the "superintendence, direction and control of the country," that is to say, for governmental purposes. The two views are obviously contradictory and cannot both be right. I have already given my reasons for holding the view expressed in *Nobin Chunder Dey's* case to be erroneous. I cannot say either that that propounded in *Shivabhanjan's* case is correct. Reading secs. 65, 68 and 42 of the Government of India Act of 1858 [now sec. 32, cls. (2), (3) and (4) and sec. 20 (2) (c) of the Act of 1915] together, it is obvious that the provision in sec. 42 [now sec. 20 (2) (c)], charging the debts and liabilities of the Government of India on the revenues of India, is but the counterpart of the provision in sec. 68 [now sec. 32 (4)] relieving the Secretary of State and Members of his Council from personal liability in respect of claims against the Government of India. Sec 42 merely points out the source from

True reading  
of secs. 42  
and 68 of the  
Government  
of India Act  
of 1858.

(a) 8 M.I.A. 103, at p. 130 (1860).

(b) I.L.R. 1 Cal. 11 (1875).

(c) I.L.R. 39 Mad 351 (1914).

which all the liabilities of the Government are to be met. It in no way limits the operation of sec. 65. These sections are plainly intended, to give effect to the intention of the legislature to constitute "the Exchequer of India" [as Mitter, J. calls it in *Doya Narain v. Secy. of State* (a)] or the Government of India (as I would prefer to call it) into a body corporate, the *dicta* to the contrary in *Kinloch v. Secy. of State* (b) and *Doya Narain v. Secy. of State* (c) notwithstanding.

Need for recognising the corporate character of individual colonies and dependencies of the British Empire, of the Imperial Government and of the Government of the United Kingdom.

31. The Government of India, I have said before, stands apart from most other colonies and dependencies of the British Empire, in its legally recognised corporate character. In this matter it stands outside the general constitutional theory of the Empire—an exception to the general rule, a departure which Parliament was constrained to sanction in 1858 in order to preserve the continuity of the administration as it was in the regime of the East India Company. And yet, it is possible that it would not have stood alone in its character as a body corporate if the North American Colonies of Britain had not severed relations with the Mother Country, for the Government of three of them, *viz.*, Massachusetts, Rhode Island and Connecticut, was, like that of the Asiatic Factories of the East India Company, entrusted to chartered companies. Even now, the chartered company Governments in South Africa and elsewhere stand in much the same position in which the East India Company stood before 1858, and may well be regarded as other exceptions to the general rule. The general rule (or rather theory) is that the King in person is the Government not only in the British Isles but in every part of the Empire. The fact of course is otherwise. The Government of each Colony is distinct, however intimate (or otherwise) its relations with the Home Government may be. Without denying the unity of the Imperial organisation as a whole, to which the person of the monarch undoubtedly furnishes the coping stone, the legal independence of these Governments for internal administration is a fact so patent to everybody that its recognition in the general legal theory cannot really be deferred much longer. As it is, Parliament itself has not been able

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(a) I.L.R. 14 Cal. 258 (1886).

(b) L.R. 15 Ch. Div. 1 (1880).

to suppress the separate entity of the colonial administrations in its enactments relating to them. The British North America Act (a) frankly speaks of the properties and debts of the Provinces of Canada. But this deviation from fiction to fact proved too much for the lawyers. "In construing these enactments", they say, "it must always be kept in view that whenever public land with its incidents is described as the property of or as belonging to the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown" (b). This language is of a piece with that used with reference to the "Secretary of State for India in Council" in *Kinloch v. Secretary of State* (c) and *Doya Narain v. Secretary of State for India* (d), upon which I have already commented. "And so", says Maitland, "we have to distinguish between lands vested in the Crown for or in the right of Canada from lands vested in the Crown for or in the right of Quebec or Ontario etc. Apparently Canada or Nova Scotia is person enough to be the Crown's *cestui que trust* and at the same time the Crown's representative, but is not person enough to hold a legal estate" (e). "It is a funny jumble", adds Maitland, "which becomes funnier still if we insist that the 'Crown' is a legal fiction" (f).

32. The Commonwealth of Australia and the constituent Australian States are, like the Canadian Dominion and Provinces, unincorporated colonies. They have, however, been wise enough to incorporate themselves by local legislation. "They are," says Salmond, "now to be deemed for certain purposes bodies politic and corporate, for by virtue of Austra-

Australian Commonwealth and States incorporated by local statutes.

(a) 34 Vict. c. 28, secs. 110-125.

(b) *Oatharine's Milling & Lumber Company v. The Queen*, 14 App. Cas. 46 (1888), at p 56; *A. G. of British Columbia v. A. G. of Canada*, 14 App. Cas. 295 (1888); *A. G. of Ontario, v. Mercer*, 8 App. Cas. 767 (1888) and *A. G. of Canada v. As. Gs. of Ontario, Quebec & Nova Scotia* (1898) App. Cas. 700 (1880).

(c) 15 Ch. Div. 1 (1880).

(d) I. L. R. 14 Cal. 258 (1886).

(e) 17 L. Q. R. p. 142.

(f) *Ibid*, pp. 142-143.



lian legislation they can now sue and be sued in their own names, and possess other attributes of personality. Thus an action will now lie at the suit of the State of Victoria against the State of New South Wales". The writer, however, goes on to add by way of warning that the corporate character thus bestowed upon the States is concurrent with, and not exclusive of, the old common law principle which identifies the State with the King. Public lands in Australia are thus, in law, still the lands of the Crown except so far as they may be expressly vested in the corporate State by statute (a). Nevertheless the progress made here towards allowing facts to obtain a legal footing is remarkable. The Government of New Zealand, it has been judicially affirmed, is not a person or a body corporate, and so a suit instituted against the "Governor and Government of the Colony of New Zealand" failed, there being no person or body corporate "known to law" answering that description (b). In the absence of statutory authority binding upon both, it is apparently not possible for one colony or dependency to enter into legal relations with another. An Australian decision (c) goes so far as to regard the Crown as representing the States and the Commonwealth as several juristic persons; and, in Mr. Salmond's opinion, though the King represents the whole empire, it is possible for the law to recognise a different personality in him in respect of each of its component parts. But the combination of these several personalities in one individual is not accidental and the doctrine of plural personality, if applied to explain the legal position of the several colonies and dependencies of the Empire and of the local administration of the United Kingdom itself, will fail to reflect the unity that lies behind this diversity of character and interests. The only satisfactory way to adjust the legal relations of the several units of the Empire *inter se* and with the Central Government, and one which will also accord with facts is to recognise once for all that the various dependencies of the Empire and the local

New Zealand  
judicially de-  
nied corpo-  
rate status.

Mr. Sal-  
mond's theo-  
ry of plural  
personality  
of the King  
examined.

True solution.

(a) Salmond, *Jurisprudence*, Second Edition, p. 360.

(b) *Sloman v. Govt. of New Zealand*, 1 C.P.D. 563 (1876). To James, L.J., in this case, it appeared to be an abuse of language to speak of the Governor and Government of New Zealand as a corporation.

(c) *Municipal Council of Sydney v. The Commonwealth*, 1 Commonwealth L.R. p. 231, cited in Salmond's *Jurisprudence*, Second Edition, p. 301.

administration of the United Kingdom itself are "bodies politic and corporate, each possessing a distinct personality of its own and capable in its own name and person of rights, liabilities and activities." The recognition can come most conveniently from a Parliamentary statute, and when it comes, it will no more affect the integrity of the Empire than the recognition of the corporate character of local self-government units in a unitary government affects the integrity of that government. Incidentally, too, it will solve the problem of State liability for torts in the manner in which Mr. Maitland would have liked to see it solved, for the Mother Country as well as for the Colonies.

33. For the sake of contrast, I mention here the fact that the several States of the American Union are, in the eye of law, independent entities though not bodies corporate. The Federal judiciary in the United States has jurisdiction over controversies in which the United States is a party, controversies between two or more States, between a State and a citizen of another State (the State being the suitor), between citizens of different States, between citizens of the same State claiming land under grants from different States, and between a State or its citizens and foreign States, citizens and subjects (a). They are not merely independent legal, but, to a certain extent, independent international units, and that is why the Federal courts are denied jurisdiction to entertain suits against a State at the instance of a citizen of another State.

Legal position  
of the States  
of the American  
Union.

34. The identification of the King with the State which is such a marked feature of the English constitution has led to the State in that country acquiring a considerable number of privileges and exemptions in legal proceedings, some of which I shall now consider. We have seen how the only judicial proceeding admissible in England against the Crown must be initiated as a petition for his Majesty's grace and favour. It is also not possible under English law to take the King's goods in execution or take a distress of lands in his possession, nor may Crown chattels in the hand of a subject be taken in execution or for distress. The Crown is not bound by fictions of law or by estoppels. Negligence

Privileges of  
Government  
as a litigant.

(1)  
In England.

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(a) See Woodrow Wilson, *The State*, p. 536.

and laches are, in general, no bar to the Sovereign's right of action, whether the negligence be due to himself or his officers, but this rule has been modified by statutes of limitation. Prescription Acts do not bind the Crown except when expressly named. The Crown may in general choose its own forum and sue in what Court it pleases, and though special modes of redress against the subject by means of informations, inquisitions or inquests of office, extents, *scire facias*, *quo warranto* and mandamus are provided by law, the Crown may usually waive these prerogative remedies and resort to the usual forms of action, unless they are inconsistent with Royal dignity. In suits between third parties, the Attorney General should be made a party where rights of the Crown are or may be called in question, but where this has not been done, and the Crown's title is clearly proved, the Court may give judgment *ex officio* for the Crown. When the Crown is interested in a suit, it is entitled to demand a trial at bar as of right which must be granted on motion by the Attorney General, the order being absolute in the first instance. And apart from statutory provisions, the general rule at common law is that neither the Sovereign nor any person suing to his use pays or receives costs. The common law rule is however stated to be subject to important modifications and the statutory provisions with regard to payment of costs to or by the Crown are numerous (a).

(ii)  
In India.

35. Are these numerous "prerogatives" and privileges available to the Government in judicial proceedings in India to which it is a party? If the Secretary of State for India in Council be, as Lord Justice James and Mitter, J., have said, a fiction, a name only by which the Government of India is to sue and be sued, and the Crown *in propria persona* the legal owner of the State properties and of the revenues of India, who will deny that they are? And yet the inconvenience and impolicy of transplanting wholesale these traditional rights of the Crown in Indian soil are so obvious, that judges in this country have not been disposed to accept them without important qualifications. On the other hand it has been suggested that under the common law of India, the Government of India may be entitled to rights and privileges not known to English law.

Common law  
prerogatives  
of the Crown  
in India.

(a) Halsbury, Laws of England, Vol. VI. pp. 408-412.

Government here as landlord has assumed the right to assess and re-assess the lands of zemindars and raiyats with rent as a part of its "Indian common law" prerogative. It has also been suggested that the prerogative of the Crown in India may differ in different Provinces. There is cumulative authority for the proposition that the Government of India has such of the powers, prerogatives and immunities appertaining to the Crown as are appropriate to the case and consistent with the system of law in force in India, and it has accordingly been decided that statutes alleged to bind Government must show that intention expressly or by necessary implication and debts due to the Government have preference over debts of the same order due to a subject (a).

36. Under sec. 80 of the Civil Procedure Code (Act V. of 1908), no suit can be instituted against the Secretary of State for India in Council, until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the Local Government or the Collector of the District, stating the cause of action, the name, description and place of residence of the Plaintiff and the relief which he claims, and the plaint should contain a statement that such notice has been so delivered; and under sec. 82, a decree against the Secretary of State for India in Council has to specify a time within which it should be satisfied and if the decree is not satisfied within that time, the Court has to report the case for the orders of the Local Government, and execution cannot issue unless the decree remains unsatisfied for the period of three months computed from the date of such report. Finally, when the Government prefers an appeal against a decree passed against it or against a public officer whose defence has been undertaken by Government, and application is made for stay of proceedings under or in execution of the decree, the Court in proceeding to grant this application cannot insist on the appellant furnishing the security which other

Indian statutory provisions relating to procedure in suits and executions against Government.

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(a) *Secy. of State v. Bombay Landing and Shipping Company*, 5 Bom. H.C. Rep. O.C.J. 23 (1866); *Ganpat Putaya v. Collector of Canara*, I.L.R. 1 Bom. 7 (1875); *Secy. of State v. Mathurabhai*, I.L.R. 14 Bom. 213 (1889); *Gulzari Lal v. Collector of Bareilly*, I.L.R. 1 All. 596 (1897); *Collector of Moradabad v. Muhammad Daim* I.L.R. 2 All. 196 (1879); *Gayanda v. Butto Krishna*, 10 C.W.N. 857; 33 Cal. 1040. (1906) and *Bell v. Municipal Commrs. for Madras*, I.L.R. 25 Mad 457 (1902).

appellants similarly circumstanced must provide under the Code (see Or. 41, r. 7 of act V. of 1908).

## LECTURE XIV. OF THE SUPREME EXECUTIVE.

Cabinet government—a compromise between a singleheaded and a collegiate supreme executive.

Legal irresponsibility of Chief Executive essential to it.

Irresponsibility of Supreme Executive essential to all Government, but need not be absolute.

1. I have in a previous lecture drawn attention to the preference which modern nations with the single exception of Switzerland (that of the German Imperial Government being doubtful) have expressed in favour of a personal Chief. But though the collegiate principle in the organisation of the central executive has on the whole been rejected, something approaching it has been sought to be secured by that very modern institution—Cabinet government. The Cabinet form of government, from this point of view, may be regarded as a device by which the representative assembly of a people is enabled to control a centrally directed college of Ministers and prevent it from acting in an illegal and arbitrary manner. What perhaps has not been made clear is the fact that the coping stone of that system, as also of other transitional forms leading up to it, is furnished by the irresponsibility of the Chief Executive.

2. The *legal* irresponsibility of the Chief Executive, where there is one, is not a mere relic of ancient superstition; it is a fundamental principle of political science. The irresponsibility of the Chief Executive need not and cannot be maintained at the present day in the absolute form in which it existed in many ancient polities. Where the supreme power of the State has, in fact, passed from the personal head to a representative assembly, the former must act according to the wishes and directions of the latter. But personal responsibility for breaches of the law before judicial tribunals is a different matter. If the personal irresponsibility, in the eye of law, of the Chief Executive were in fact incompatible with the supremacy of the representative legislature, the legal irresponsibility of the former would obviously have to go. But the two are not irreconcilable. It is possible also that this irresponsibility before the law may admit of some qualification without injury to the public interest. In the French and American Republics where the Chief Executive is a private

citizen elected to the office for a term of years, that irresponsibility has necessarily to be limited, at least in duration. But some degree of legal irresponsibility, varying with the tenure of the Chief Executive, there must be, if the unity and integrity of administration (which I have previously demonstrated to be a fundamental condition of the rule of law) is not to be put in jeopardy. The limits which it may be deemed advisable to place upon the irresponsibility of the Chief Executive must not in any case be suffered to bring about an *interregnum*. No system of administration for instance can safely permit the arrest and imprisonment of its Chief Magistrate either for a civil debt or for a crime.

3. The irresponsibility of the Roman Emperor was not merely legal, but absolute. So was presumably that of the Kings of early Roman history. This was because, like Louis XIV of France, they could claim to be "the State". The English Parliament to-day is for the same reason irresponsible legally and absolutely. So were the Sovereign Councils of ancient and medieval City States. The origin of the legal irresponsibility of the personal head of a Government is undoubtedly to be traced to times when the King was in fact the Sovereign power within the State. So long as the two remained identified, the question did not admit of being mooted. The moment however the King comes to be viewed as the holder of an office, the most exalted though it may be in the gift of a nation, the question of his responsibility before the judicial organ of the State assumes importance and demands solution at the hands of constitutional lawyers.

Absolute irresponsibility of Sovereign Kings and Assemblies.

Reduces itself to legal irresponsibility when the King becomes holder of an office.

4. The question presented itself squarely to the Romans when the Royal office ceased to be hereditary and came to be filled annually by Consuls elected by the people themselves. Unlike their Royal predecessors, the Consuls did not rule by divine right. The office remained sacred, but the officers were private individuals before election and would revert to private status after their brief year of office. It seemed invidious to the Romans that the persons who by the constitution was to wield the *imperium* should be dragged before an inferior Magistrate and made to answer for his alleged infringements of the law, so long at any rates as he held the *imperium*. But the objection ceased to apply when the Consul returned to private life. Roman law made the Magistrates

Instances.

(i)  
The Consuls of Rome.

Qualified nature of their immunity.

accountable for wrongs committed during the term of their office after they returned to private life (a). But during that term they discharged their public functions without fear of action at the instance of citizens who might have reasons to complain against their acts (b). When the chief Magistracy became a permanent hereditary office, the immunity again became absolute.

(ii)  
The President of the United States of America.

5. The phenomenon has recurred in more recent times. The King, according to English constitutional law, can do no wrong. But the thirteen American Colonies of Britain, when they forsook their allegiance to his Majesty King George III, elected to dispense with the King and proceeded to organise themselves into a Republic with a President elected for a term of four years only as their Chief Executive. The constitution of the Republic specifically provided for the removal from office of the President upon impeachment by the House of Representative, ending in conviction for "treason, bribery and other high crimes and misdemeanours" before a Court of Impeachment constituted by the Senate with the Chief Justice of the United States as president. Beyond these provisions there is not a word in the constitution either conferring immunity on the President or taking it away. And yet the legal irresponsibility of the President, save as provided by these clauses of the constitution, is accepted as a postulate of political science in the United States (c). It

Qualified nature of his irresponsibility.

(a) See Greenidge, *Roman Public Life*, p. 181.

Liability of Roman Magistrates to impeachment for crimes and arrest for contumacy by Tribunes, during office.

(b) It should be remarked, however, that from the 3rd century B.C., a practice grew up, according to which Magistrates could be impeached even during the term of their office before the Tribes or the Centuries by a Tribune. "But so strong," says Greenidge, "was the feeling against this indignity to the Magistracy that the veto of a colleague postponed the decision until the expiry of the official functions of the delinquent." *Roman Public Law*, p. 182. Consuls, Prators and in fact all Magistrates were further subject to the *coercitio* of the Tribune, who for disobedience of his orders could even place them under arrest, *Ibid*, p. 169. From both forms of liability, the Tribunes of course were exempt.

(c) See Burgess, *Political Science and Constitutional Law*, Vol II, p. 24-5; Goodnow, *Comparative Administrative Law*, Vol. I, pp. 73-74; 2 Story, *Constitution* para 1569; Black's *Constitutional Law*, para 66. To say that the President is legally irresponsible is going a good deal further than to affirm the obvious truth that in the exercise of his constitutional powers and functions, the President is an independent, co-ordinate branch of the Government, not subject to the direction or control of either Congress or the courts, See

does not however go further than allowing these privileges up to the moment when he vacates his office owing either to a judgment of removal pronounced by the Senate or resignation or expiry of his term of office. From this moment the President becomes accountable for his conduct in office before the ordinary courts (a). He may be arrested, imprisoned and condemned as a common citizen for any crime or misdemeanour committed while President. The constitutional lawyers of the United States have thus found the same solution as the Romans of the problem of reconciling the personal irresponsibility before the law of the Chief Executive with the rule of law. Such a solution suggests itself easily and naturally when the hereditary incumbent of the office is replaced by an elected citizen holding office for a term, in consequence of a revolution. When, however, the conversion of sovereignty into an office takes place without a breach in the hereditary principle, the solution of the problem is met by seemingly insuperable logical difficulties. How can the King remain a King and yet be made responsible?

The descent from absolute to qualified legal irresponsibility not easily accomplished when the Chief Executive remains hereditary.

6. I have shown previously how in the feudally organised societies of Western Europe only, the Monarchy was directly confronted with this question. Under Feudal theory, the Monarch was, from one point of view, only a superior landowner. But the Feudal monarchy itself, as an institution, was built on the Imperial Roman Model, and, according to the constitutional theory of the Empire, the Emperor was irresponsible. Thus it is that we find that in England the "King," who according to English constitutional theory "can do no wrong," has nevertheless at or before his coronation to take oath *inter alia* "to govern the people of the United Kingdom of Great Britain and Ireland, and the dominions thereto belonging, according to the statutes in Parliament agreed on and the laws and customs of the same" (b). To

Absolute irresponsibility of the King why questioned in Feudal Monarchies.

The acknowledged irresponsibility of the King in England contradicted by his coronation oath.

*Mississippi v. Johnson*, 4 Wall. 475, *Marbury v. Madison*, 1 Cranch 137. It means immunity in respect of acts beyond his competence under the constitution.

(a) See Burgess, *Political Science and Constitutional Law*, Vol. II. pp. 245, 291. The constitution of the Argentine Republic expressly provides that the President may be tried before ordinary courts after removal (Art. 52)

(b) See Halsbury's *Laws of England*, Vol. VI, p. 338. The coronation oath may be summed up shortly in the phrase "The King must not do wrong."



any one not bred and brought up as an English lawyer, the antinomy would appear to be insoluble. The obvious way to reconcile the irresponsibility of the monarch with his coronation oath would be to treat the latter as a moral injunction only. But English lawyer politicians who had the building of the constitution in their hands were by no means disposed to accept a solution which meant the establishment on the island of autocracy of the Continental type. They found another which, however illogical the process by which it was reached, is yet of such capital political importance that it has been seized upon by framers of constitutions all over the world as a fundamental postulate of political practice.

A triumph  
of dialectic  
and common  
sense.

7. The process of reasoning, which does no end of credit to the ingenuity of English constitutional lawyers, was something like this: The King can do no wrong, why? Because he does not desire to do wrong, because in fact he is incapable of even thinking wrong. It follows therefore that he cannot authorise others to do wrong, and if anybody else professes to do something in the King's name or under his command and thereby does a wrong, the act could not clearly have been authorised by the King. It follows therefore that no Minister of the King can plead his authority in defence of an illegal act committed by him in his public capacity. The King might, for aught one can see, have been regarded as a corporation created only to do right, so that any illegal act done by him or his agent would be *ultra vires* of the King and therefore something for which the "parsonified" monarch could not be held legally responsible. The responsibility of the Minister for acts even directly authorised by the King thus rendered the irresponsibility of the monarch innocuous at least in regard to acts performed through agents. But what about acts done by the monarch himself? As to these, English constitutional lawyers were convinced that the less the King acted on his own responsibility the better, for were not the King's motives in respect of such acts liable to misconstruction by the uninstructed public? From this it followed that no public act should be done by the King in person, but that every such act should be done by and on the responsibility of a Minister. The result of this elaborate and highly specious chain of arguments (which I should add took centuries to develop) has

Responsibility of Ministers deduced from the irresponsibility of the King.

been, in the words of Lord Courtney of Penwith (a), to make the King, once in very truth the master, now the minister, of his Ministers (b).

8. The plain truth is that the irresponsibility of the Chief Executive is incompatible with the rule of law and the freedom of the subject, unless it is coupled with the responsibility of his Ministers for every one of his public acts. The credit for the discovery and affirmance of this important principle as a postulate of sound administration belongs entirely to English lawyers (c).

Importance  
of the dis-  
covery.

9. The principle of ministerial responsibility had not been clearly established in England when the thirteen American Colonies broke off from the Mother Country. It therefore finds no place in the United States constitution. The constitutions of all the countries of Europe and of the Latin American republics are however of subsequent dates. Of seventeen of these constitution, which (besides that of the United States) are to be found in Mr. Dodd's collection, with the single exception of the Russian constitution of 1906, each one requires the counter-signature of a Minister for the validity of all acts and orders of the Chief Executive, and this even in republican constitutions which do not expressly make the President legally irresponsible. In monarchical constitutions, this provision forms but the necessary complement of the irresponsibility before law of the monarch. The makers of these constitutions, however, have only borrowed the results without making themselves responsible for the reasoning by which they were reached. None of these constitutions for instance attributes to the King incapacity to *think* wrong. But this is still an accepted doctrine of English constitutional law and serves the useful purpose of enabling illegal Royal grants to be

Spread of  
the doctrine  
almost every-  
where ex-  
cept in the  
United  
States.

Even in Re-  
publican  
countries.

(a) Working Constitution of the United Kingdom, p. 86,

(b) See Broom's Legal Maxims, Eighth Ed., 1911. pp. 39-42.

(c) Throughout the present discussion, the terms "responsible" and "responsibility" and their contraries have reference to *legal* responsibility only. This responsibility is enforceable if at all in courts of law. On the analogy of this responsibility has grown up the responsibility of Ministers for their *policy*. This responsibility may, under the constitution, be either to the King or to Parliament. One constitution, that of Denmark, holds the Ministers responsible to both King and Parliament which of course is impossible. I have shown elsewhere that given the power of supply and appropriation, the Legislature is bound in the end to control the policy of Ministers.

avoided on the ground that the Sovereign was "deceived in his grant"—rather *that* than "that His personal Majesty should be lessened by imputations of intentional wrong" (a).

Are subordi-  
nates carry-  
ing out the  
illegal orders  
of the Presi-  
dent of the  
United Sta-  
tes immune  
from action.

10. The principle of ministerial responsibility has not only not been adopted in the framework of the constitution of the United States, it has not been worked out, as it might have been, in practice during the century and a quarter which have elapsed since it came into operation. What then is the legal position of subordinates executing illegal orders issued at the discretion of the President? I am not surprised to find it suggested in the case which affirmed the irresponsibility of the President (b) that even these agents of the President are immune from action in respect of such acts. American lawyers are apparently disposed to view the irresponsibility of their chief Magistrate more literally than their English prototypes. Whether they would have done so, if the capacity of this functionary for mischief had not been as strictly circumscribed as it happens to be, may well be doubted. As it is, the Federal administration of the United States is so intimately regulated by statutes that little discretion is left to him at least in times of peace. The

Reasons why  
the anomaly  
is tolerated  
in the Uni-  
ted States.

(a) Halsbury, *Laws of England*, Vol. VI p. 374. In the monarchical constitutions collected in Dodd's *Modern Constitutions* (except in that of Russia) there are provisions affirming the irresponsibility of the monarch coupled with the responsibility of Ministers. The Turkish constitution of 1909 also contains similar provisions. See *Journal of the Society of Comparative Legislation N. S.*, No. XX, Article on "The New Turkish Constitution," pp. 328-336. As to Russia, Art. 4 of the Constitution of 1906 said that the Emperor of all the Russias wielded the supreme autocratic power, and that to obey his authority, not only through fear but for the sake of conscience, was ordered by God Himself; and that His person was sacred and inviolable. His acts and orders were by another article required to be countersigned by Ministers, but the latter's responsibility was stated by Art. 81 to be to the Emperor.

(b) *Durand v Hollins*, 4 Blatchford 451. Mr. Garner, however, denies that the order or authority of the President can be pleaded in defence of acts done by his subordinates in violation of laws. See his article on "Judicial Power, Theory of" in the *Cyclopedia of American Government*. The correct proposition with regard to this matter seems to be that in so far as heads of the executive departments are under the direction and control of the President in respect of such duties as involve political action and the exercise of judgment and discretion, they cannot be controlled and coerced by Congress or the Courts, but this is very different from saying that they enjoy the President's irresponsibility.

statement that "in ordinary times, the President may almost be compared to the managing clerk in a business establishment whose chief function is to select his subordinates (a) is, in view of what has been said before, an obvious exaggeration. There is yet enough truth in it to explain why this exceptional position of the President has not been seriously questioned. It is obvious also that if the President, on the termination of his office, becomes answerable before civil and criminal courts for his conduct while in office, his irresponsibility is sufficiently qualified to reduce the risk inherent in it to a minimum. Even so, however, the constitution of the Argentine Republic which, as regards the position of the President, follows closely that of the United States, supplies the omission by expressly providing for the responsibility of Ministers whose counter-signature is by it made necessary to confer validity on the acts and orders of the President. A similar provision appears in the constitutions of Brazil, Chile and Mexico, and in the present constitution of France (b).

Not favoured  
by the Latin-  
American Re-  
publics or by  
France.

11. Of the several republican constitutions just mentioned, that of France is the only one which expressly affirms the irresponsibility of the President, save only for treason. For treason, the French President is liable to impeachment at the instance of the Chamber of Deputies before the Senate. Beyond this his irresponsibility is in character regal. But as in the case of the English King, and in imitation in fact of English practice, his public authority is exercisable only through Ministers who must countersign his acts and orders and are responsible besides *for the policy* of their acts to the legislature. The President of France, according to Sir Henry Maine, "neither reigns nor governs" (c).

Ministerial  
responsibility  
in France.

12. We have seen how the omission of the United States constitution to provide for the irresponsibility of the President when in office has been made good by the lawyers, the irresponsibility of the Chief Executive being regarded by them as a postulate of political science. I find a similar tendency in the interpretation which lawyers in British Colonies and Dependencies have sought to place upon the legal position

Legal posi-  
tion of the  
Governors,  
Governors-  
General and  
Viceroys in  
British Colo-  
nies.

(a) See Encyclopedia Britannica, 11th Edn. Art. United States.

(b) For verification of the above, see Dodd's Modern Constitutions.

(c) Popular Government, p. 250.

Tendency to make them legally irresponsible if warranted by English constitutional law.

of the Crown's representatives in the Dominions. There is, I need hardly say, no occasion for it, since the Chief Executive for every part of the Empire is His Majesty the King, and he alone.<sup>1</sup> According to settled principles of English constitutional law, as explained in a previous Lecture, a Governor, or a Governor-General—even a Viceroy—is simply a public officer exercising rather larger prerogative powers by delegation than ordinary officials. Grant of prerogative power, short of independence, still leaves the recipient a public official and does not make him sovereign. A Viceroy to whom the largest delegation of sovereign powers has been made is not only not sovereign, he is constitutionally placed under the direction of one of his Majesty's Secretaries of State whose powers are thus larger than his. The so-called "representatives" of his Majesty are but "agents" of the Crown like any other official in the public service.

Governors and Viceroys must equally act within the law.

13. A Governor of a British Colony, it is said, holds but a limited authority from the Crown, it being derived from his commission and confined to powers thereby expressly or impliedly entrusted to him. It follows therefore that any assumption by him of an act of sovereign power outside the limits of that authority would be void in law, and the Courts, even of the Colony over which he presides, could not give it any legal effect (a). The act would simply be *ultra vires* of the Governor—an objection which will be obviously inapplicable in the case of a Viceroy to whom the whole sovereignty of the Colony has been delegated. Even then, to be valid and obligatory upon the subjects living within his Government, the act must be one which "would be valid, if done by the Sovereign himself—though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct" (b). This passage has been quoted with approval in *Musgrave v. Pulido* (c) and is strongly reinforced by the judgment delivered in that case by Sir Montague Smith.

(a) *Cameron v. Kyte*, 3. Knapp 332 (1835).

(b) *Ibid* p. 343. The judgment in this case was delivered by Baron Parke, and one of the parties to it was Lord Brougham whose collected works contain some of the profoundest studies on the English Constitution to be found in any language. Mr. Garner draws liberally from the writings of Lord Brougham for many telling passages in his "Introduction to Political Science."

(c) 5 App. Cas. 102 (1879), pp. 109-110.

14. In view of these pronouncements and the high authority from which they emanate, I do not think that much importance can be attached to the somewhat different rule propounded in certain Irish cases where it appears to have been held that the Lord Lieutenant of Ireland being "the direct representative of the Crown", his official acts (even when contrary to law) are to be regarded as acts of State for which he cannot be held personally liable in the Irish courts" (a). I am not sure I understand this ruling, if it does not amount to holding that in the case of the Lord Lieutenant of Ireland and other similarly exalted functionaries, the King is allowed by law to authorise his agents to do the wrong which he himself can neither do nor intend. If it does, it is directly contrary to the fundamental principles of English constitutional law already explained. Lord Brougham at any rate had no doubt that *Tandy v. Westmorland* was erroneously decided [*Hill v. Bigge* (b)]; and this case and the later case of *Luby v. Wodehouse* were "explained" by Sir Montague Smith in *Musgrave v. Pulido*, cited above, on the ground that "in both it appeared that the acts complained of were assumed to be within the limits of the authority delegated to the Lord Lieutenant by the Crown" and the "Courts appear to have thought under those circumstances that no action would lie against the Lord Lieutenant, and that upon the facts brought to their notice it may well be that no action would have lain against him *anywhere*" (c).

Certain Irish decisions to the contrary not approved by English judges.

15. Mr. Tarring in his article on "Dependencies and Colonies" in Halsbury's Laws of England, summarising the authorities in which the legal position of the Governor of an English Crown colony or dependency has been considered, says: "A Governor is responsible only for acts of a private character committed by him in his colony, and may be sued for them both in the colonial courts and in England, but apparently he cannot be held liable in any court for acts within the limits of his commission done under the authority of the Crown". If the latter part of this statement is intended to affirm the Governor's immunity for his lawful acts, it is superfluous. If

Mr. Tarring's summary of the law criticised.

(a) *Tandy v. Westmorland* (1792) 27 St. Tr. 1246, 1260; *Luby v. Wodehouse* (1815) 17 Ir. C. L. R. 618 and *Sullivan v. Spencer* (1872) 6. I. R. C. L. 173.

(b) (1841) 3. M. P. C. C. 465 at 480.

(c) 5 App. Cas. pp. 111-112 (1879).

however it means that the Governor is not responsible for acts "which would not be valid if done by the Sovereign himself", that is to say, for his illegal acts, it is erroneous and unsupported by the authorities cited by him (a).

Legal position  
of the Governor  
General  
of India.

16. The Governor General of India is appointed by His Majesty by warrant under the Royal Sign Manual (b), which confers on him virtually the whole prerogative of the Crown even as regards dealings with foreign powers (c). The Governor General is thus in the position of a Viceroy though nowhere expressly so designated by statute. If the Irish cases cited above be taken to have correctly determined the legal position of the Lord Lieutenant, no action would lie in the Courts in India against the Governor General for anything done by him in his public capacity. But, statutory provisions apart, the Governor General of India, equally with the Lord Lieutenant of Ireland, would be liable for every personal injury or debt in the local courts. I have, whilst examining the Irish cases, given reasons for denying to Viceroys immunity in respect even of their public acts. But in order to put an end to the Homeric contests which were waged between the Governor General and Council and the Supreme Court in the first years of their existence, Parliament in 1781 virtually placed the Governor General and Members of his Council beyond the jurisdiction of the Supreme Court. The provisions of this and other enactments, now consolidated and embodied in sec. 110 of the Government of India Act, lay down that the Governor General, each Governor and each of the Members of their respective Executive Councils shall not (i) be subject to the Original Jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor (ii) be liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its Original Jurisdiction; nor (iii) be subject to the Original Criminal Jurisdiction of any High Court in respect of any offence not being treason or

Statutory  
immunity of  
Governor  
General and  
Governors  
and their  
Councillors—  
its origin and  
limited  
scope.

(a) *Hill v. Bigge*, 3. M. P. C. C. 465 (1841); *Mostyn v. Fabrigas*, Cowp 161 (1775); *Glynn v. Houston*, 2 Man. and G. 337 (1841) and *Musgrave v. Pulido*, 5 App. Cas. 102 (1879).

(b) Government of India Act, 1915, sec. 34.

(c) Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, p. 103.

felony (a). It was not then, nor presumably is it now, apprehended that there would ever arise an occasion when processes may have to issue against the Governor General from a Company's court, and a consideration of the question whether at this date the Courts in India, other than the Original Sides of the Chartered High Courts have jurisdiction civil or criminal over the persons and acts of the Governor General and Governors and their Councillors may seem, for all practical purposes, to possess a purely academical interest. It seems nevertheless to be the fact that the jurisdiction of these courts is not excluded by statute, and, apart from the Irish precedents previously noticed, must be taken to exist. The exemption from the jurisdiction of the Original Sides of the Chartered High Courts does not also appear to be absolute. But it seems to be within the competence of the Indian legislature to confer on the Governor General, Governors and their Councillors as complete an immunity as may be desired, for it has been ruled in *Phillips v. Eyre* (b) that the illegal proceedings of a Colonial Governor may be legalised by a colonial statute depending for its enactment *inter alia* on his own assent. So it has been enacted by the Indian Specific Relief Act (c) that none of the High Courts at Calcutta, Madras and Bombay shall make any order in the nature of a *mandamus* binding on the Secretary of State for India in Council, or the Governor General in Council, or the Governor of Madras in Council, or the Governor of Bombay in Council or the Lieutenant Governor (now the Governor in Council) of Bengal.

Power of  
Indian legis-  
latures to  
extend it.

17. In sec. 127 of the Government of India Act of 1915 is re-enacted a provision contained in previous statutes according to which any person holding office under the Crown in India and committing any offence "under the Act" or any offence against any person within his jurisdiction or subject to his authority, may, without prejudice to any other jurisdiction, be tried before His Majesty's High Court of Justice and be dealt with as if the offence was committed in the County

(a) Under sec. 93 of the Presidency Towns Small Cause Courts Act, they are exempted from arrest or imprisonment under any process of a Presidency Small Cause Court.

(b) L. R. 4 Q. B. 225 (1867).

(c) Sec. 45, Act I of 1877.



of Middlesex. Amongst "offences under the Act" are those specified in sec. 124 which provides that "if any person holding office under the Crown in India does any of the following things, that is to say, (1) if he oppresses any British subject within his jurisdiction or in exercise of his authority ; or (2) if (except in case of necessity, the burden of proving which shall be on him) he wilfully disobeys, or wilfully omits or forbears or neglects to execute any orders or instructions of the Secretary of State ; or (3) if he be guilty of any wilful breach of the trust and duty of his office ; or (4) if, being the Governor General, or a Governor, Lieutenant Governor or Chief Commissioner, or a Member of the Executive Council of the Governor General or of a Governor or Lieutenant Governor, or being a person employed or concerned in the collection of revenue or the administration of justice, he is concerned in, or has any dealings or transactions by way of trade or business in any part of India, for the benefit either of himself or of any other person, otherwise than as a shareholder in any joint stock company or trading corporation ; or (5) if he demands, accepts or receives, by himself or another, in the discharge of his office, any gift, gratuity or reward, pecuniary, or otherwise, or any promise of the same, except in accordance with such rules as may be made by the Secretary of State as to the receipt of presents, and except in the case of fees paid or payable to barristers, physicians, surgeons and chaplains in the way of their respective professions, he shall be guilty of a misdemeanour, and if he is convicted of having demanded, accepted or received any such gift, gratuity or reward, the same or the full value thereof shall be forfeited to the Crown, and the Court may order that the gift, gratuity or reward, or any part thereof, be restored to the person who gave it, or be given to the prosecutor, or informer, and that the whole or any part of any fine imposed on the offender be paid or given to the prosecutor or informer, as the Court may direct." Under sec. 129 of the Act any person committing any offence referred to in the Act is liable to such fine or imprisonment or both as the Court thinks fit and is further liable at the discretion of the Court to be adjudged to be incapable of serving the Crown in India in any office, civil or military, and, if he is convicted in British India by a High Court, the Court may order that he be sent to Great Britain.

18. On the whole, therefore, I must conclude that under the common law, the Viceroy of India (not to speak of Governors, Lieutenant Governors and Members of their Executive Councils) is not exempt from the jurisdiction of the civil and criminal courts in India even in regard to his public acts, and that the exemption allowed by statute, due as it was to temporary causes, was not intended to mark a deliberate departure in principle from the ordinary rule of common law but, on the other hand, was confined within narrow limits, which since the amalgamation of the Supreme and the Company's Courts in the present High Court cannot but appear to be highly anomalous. The exemption, moreover, does not apply to proceedings in the High Court of Justice in England, and when the Viceroy, Governor or their Councillors lay down their office and return home they may be proceeded against criminally in England for offences committed during their employment in India, and, but for the fact that in England proceedings by way of impeachment have now fallen into virtual desuetude, would be subject to such proceedings also. Such proceedings, I need hardly add, can be initiated if at all by the House of Commons, the trial taking place before the other House. The immunity of the Viceroy of India is thus in law greatly more restricted than that of the President of the United States of America. Apparently, however, he has (if he can persuade the majority of his Executive Council to concur with him) larger powers of granting immunity to his agents than even the President of the United States on the authority of *Durand v. Hollins* (a), for under sec. 111 of the Government of India Act, 1915, the order in writing of the Governor General in Council for any act shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its Original Jurisdiction, be a full justification of the act except so far as the order extends to any European British subject—a provision reminiscent, like that of sec. 110 just noticed, of the early quarrels of the Supreme Court with the Governor General and his Council, and like it restricted in scope and anomalous, since the plea which completely bars the jurisdiction of the High Court is quite inadmissible in proceedings in Courts subordinate to it. It was, like that of sec. 110, a

Legal position of Governor General compared with that of the President of the United States.

Power of Governor General in Council to give immunity to subordinates carrying out their written order.

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(a) 4 Blatchford 451.

Its limits.

temporary provision not indicative of any deliberate departure from the accepted principles of the common law—as indeed clearly appears from the proviso that nothing in the section (110) shall except the Governor General, or any Member of his Executive Council, or any person acting under their orders from any proceedings in respect of any such act before any competent Court in England.

Legal position of Governors in Crown colonies.

19. Colonial Governors (other than the Viceroy of India), besides being subject under the common law to proceedings, civil and criminal, in Colonial Courts like any private individual, are liable to criminal proceedings in the Court of the King's Bench in England under the Governors' Act (11 and 12 Will. III c. 125) for acts of oppression within the area of their command or for any other crime or offence contrary to the laws of the realm or in force within their respective governments or commands. Under the old law of execution, though a Governor could be sued in courts of the colony for a debt, his person it seems could not be taken in execution under a writ of *capias* and it has been suggested that, on the same principle, a Governor ought not, in his own colony, to be liable to arrest on a criminal charge. The public inconvenience that may follow from such a proceeding is so obvious, that means, it may be assumed, will always be found for avoiding it. The question however has not yet been judicially determined (a).

Governors and Governors General like other officials, not personally responsible for breaches of contracts made by them for Government or for wrongs of subordinate officials.

20. Neither a Governor nor a Governor General is personally liable upon contracts made by him in his official capacity. This however is a consequence which flows not from his position as the Chief Executive of the colony, but from his constitutional position as agent or servant of the Crown (b). He is for the same reason not answerable for any tort of a subordinate under him for which he does not make himself personally responsible (c). And, in all cases in

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(a) Ridge's Constitutional Law, Edition of 1905, p. 356.

(b) *Macbeath, v. Haldimand*, 1 T. R. 172 (1786); *Palmer v. Hutchinson*, 6 App. Cas. 619, (1881); *Dunn v. MacDonald*, (1897) 1 Q.B. 555, this last case holding that no liability arises, as in the case of private agents, as for a breach of an implied warranty of authority; *Gidley v. Palmerston*, 3 Brod. and B. 275 (1822).

(c) *Lane v. Cotton*, 1 Salkeld 17 (1701), *Whitfield v. Lord Le Despencer*, Cowp. 754 (1778), *Mersey Docks Trustees v. Gibbs*, L. R. 1 H.L. 93, 124 (1866); *Ralieggh v. Goschen*, (1898) 1 Ch. 73.

which he acts judicially, he shares the immunity of all judges (a).

21. Under sec. 32 (4) of the Government of India Act of 1915, neither the Secretary of State for India nor any Member of his Council is personally liable in respect of any assurance or contract made by or on behalf of the Secretary of State in Council or any other liability incurred by the Secretary of State or the Secretary of State in Council in his or their official capacity, nor in respect of any contract, covenant or engagement of the East India Company, nor is any person executing any assurance or contract on behalf of the Secretary of State in Council personally liable in respect thereof; but all such liabilities and all costs and damages in respect thereof shall be borne by the revenues of India (b).

Statutory immunity of members of Secretary of State's Council and of the Secretary of State.

22. I have previously stated that the President of the French Republic is by its present constitution made responsible for one offence only, *viz*: treason. The President of the United States on the other hand is responsible not merely for treason, but also for bribery and "other high crimes and misdemeanours" (c). These, it seems, do not include purely "political offences" (d). In other words, he is responsible for certain classes of crimes which may be committed by him in common with any citizen of the States. "Treason", it may be noted, is specifically defined by the constitution (e) as consisting only of levying war against the United States, or of adhering to their enemies and giving them aid and comfort. The point on which I now wish to lay stress is that neither the French nor the American President can be tried for the

Jurisdiction of ordinary courts wholly or partially excluded in trials of the American and French Presidents for treason etc.

Impeachment for crimes only.

(a) *Anderson v. Gorrie*, (1895) 1 Q. B. 668.

(b) The positive significance of this clause is of course to emphasise the corporate character of the Secretary of State in Council. It is quoted here to direct attention to the fact that it expressly negatives the personal responsibility of the Secretary of State and Members of his Council in respect of liabilities if incurred in his or their public capacity, by itself a notable departure from the common law principle of ministerial responsibility. The section virtually provides a statutory indemnity out of the revenues of India for all liabilities the Secretary of State and Members of his Council may incur in the performance of their duties.

(c) Art II, sec. 4.

(d) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 298-9.

(e) Art III, sec. 3, subsec. (1),

And with  
sanction of  
lower house.

offences for which they are made responsible, in ordinary courts. The only way in which the responsibility can be enforced is by impeachment before the Senate at the instance of the Representative Assembly of the lower house. The prosecution, in other words, of the Chief Executive for these offences can be commenced only with the sanction of the lower house. The United States constitution further requires that the conviction by the Senate will follow on a majority vote of two-thirds of the members present, and (as I have already stated) the conviction, so far as the Senate is concerned, has the consequence only of removal from office and disqualification from holding office in future. Punishment proper must await the decision of the ordinary courts upon indictment which may take place after the President has been removed from or has otherwise vacated his office. Upon an impeachment of the French President, the Senate's power to pass sentence is unlimited. It may condemn to exile or death as well as to dismissal from office. And its jurisdiction in this behalf is, as I have stated, exclusive and not shared by any other court (a).

Impeachment  
in England  
did not ex-  
clude jurisdic-  
tion of courts,  
and not  
confined to  
trial for cri-  
mes, or to  
trials of high  
officials only.

Original  
purpose of im-  
peachments.  
Its later use  
to enforce  
Ministerial  
responsibility  
to Parliament

Why it has  
fallen into  
desuetude.

23. In its native home in England, impeachment, at no time, was the exclusive mode of criminal trial of high functionaries. Nor was it always limited to trial of strictly criminal charges. In the 17th and 18th centuries, impeachment was frequently resorted to for punishing Ministers for acts not unlawful in themselves but prejudicial to the national welfare. Before Parliament obtained power to appoint and dismiss Ministers, the House of Commons found in it the only means by which to make Ministers responsible to itself for their policy. Thus it was that a method originally intended to try, for ordinary crimes only, powerful men (whether peer or commoner, official or non-official) whom the King's Courts were afraid or unwilling to punish, came to be stretched to take cognisance of and try cases of what with questionable accuracy have been described as "political offences". With the development of Parliamentary responsibility of Ministers this form of trial has naturally fallen into desuetude, at least in regard to Ministers in respect of their political acts, whilst for ordinary crimes the courts are now sufficiently independent and powerful to make resort to such an extraordinary remedy as impeachment unnecessary. It can

hardly be denied that trial of cases by a chamber of the legislature is open to grave abuses, so much so that in several countries on the Continent of Europe and in several States of the American Union, special tribunals, wholly or in part independent of the legislature, have been set up to try impeachment cases (a).

24. Both the French and American constitutions have however elected to retain the English method of impeachment by the lower before the upper house for the trial of their Presidents and to confine such trials to a specific class or classes of crimes strictly so called. The Argentine Nation has adopted the procedure of the United States in practically all its details, but it has widened the list of impeachable offences by including within it "malfeasance or crime in the exercise of official functions and ordinary crimes" (b). The constitution of Brazil discriminates ordinary from political crimes, which latter are outlined in the constitution itself (c) and for which only the President may be arraigned before the Senate, whilst for ordinary crimes he may be suspended from office and handed over for trial before the Supreme Court by the House of Deputies (d). The Mexican constitution makes the President responsible for "treason, express violation of the constitution, attack upon electoral liberty and ordinary offences of a grave character" (e) and like that of Brazil provides for his trial for ordinary offences by the ordinary courts with the previous sanction of the lower house and for official crimes by the Senate whom the constitution authorises to impose "such penalties upon conviction as may be provided by law" (f). The constitution of Chile adheres to the English practice of allowing impeachments of the President to be brought by the House of Deputies only before the Senate, but improves upon its adaptation by the United States constitution by providing that the President may be impeached only within one year immediately following the conclusion of his term of office for

Procedure open to abuse. Courts of impeachment independent of legislature, set up in other countries to prevent abuse.

But not in France, the United States & Argentines.

Procedure for trial of the President in other Latin Republics of America.

(a) See notes to para. 25 *infra*,

(b) Art. 45.

(c) Art. 54, 29, 33.

(d) Art. 53.

(e) Art. 103. The responsibility, under Art. 107, is enforceable during the term of office or one year after. Cf. Art. 74 of the constitution of Chile.

(f) Arts. 169, 104, 105.

"all acts of administration which may have gravely compromised the honour and security of the State or have openly violated the constitution" (a).

Trial of  
Governors of  
States of the  
American  
Union,

25. As regards Governors of the States of the American Union, they do not appear everywhere to have been accorded the immunity which constitutional practice has conferred upon the President. Mr. Garner writing in the *Cyclopedia of American Government* (b) says that writs have not infrequently been issued against the Governor in some of the States, but that the preponderance of practice is against it, and Mr. Goodnow seems to be of the same opinion (c). But except in Oregon where impeachment is forbidden, his liability to impeachment is rather more extended than the President's. The cause of impeachment in most of the States is crime, but some provide that immorality, official corruption, misconduct, incompetence, incapacity or neglect of official duty, even favouritism is a sufficient cause. Impeachment is initiated everywhere in the lower house, except in Nebraska where the joint assembly of both houses constitute the jury of presentment. Except in New York and Nebraska, the Senate is the court of trial for cases of impeachment. In Nebraska, the Supreme Court (d) and in New York the Senate and the Supreme Court Judges in association (e) constitute the Court of impeachment. Where the Senate tries an impeachment a vote of two-thirds of its members or of members present is usually necessary for conviction and the effect of conviction in all cases is removal from office and in most cases disqualification to hold office (f).

Impeachment  
of colonial  
Governors  
and high  
officials in  
England  
practically  
obsolete.

26 As previously indicated, trial by impeachment is not confined in England to offences committed by Ministers only. All civil officers of Government are liable, at the instance

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(a) Art. 74. Art. 107 of the Mexican constitution also requires responsibility for official crimes and misdemeanours to be enforced during the period of office or one year after.

(b) See Article on "Judicial Power, Theory of."

(c) *Comparative Administrative Law*, Vol. I, p. 82.

(d) In Belgium, the Court of Cassation, and in Holland and Italy, the High Court of Justice.

(e) In Denmark, Sweden and Norway, the Court of Impeachment consists partly of Judges and partly of Members of the Upper House.

(f) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 300-301.

of the House of Commons acting as the jury of presentment, to be tried by the House of Lords not only for crimes and misdemeanours but apparently also for offences of a political nature. Colonial Governors and Governors General and other high officials of the Crown in the Colonies may on their return to England be impeached in this way, without prejudice to the right of the Crown to institute criminal proceedings in the Court of the King's Bench under the provisions of statutes previously outlined, though of course conviction or acquittal in one jurisdiction would be a bar to trial in another. The last trial of a colonial Governor before the bar of the House was that of Warren Hastings. Since that time, however, increased facilities of communication between the colonies and the Central Government have brought the Governments of the non-Self-governing colonies so much more completely under the direct control and supervision of that Government that the necessity for proceeding against their Governors by way of impeachment has for all practical purposes been eliminated, whilst the neutral position Governors hold in Self-governing colonies leave little room for any kind of proceedings against them. The Crown's power of dismissal exercisable through a Secretary of State responsible to Parliament suffices for all ordinary purposes, whilst criminal proceedings before the King's Bench Division of the High Court, provided for by statutes, meet all cases of actual crimes so much more effectively than impeachment that the latter mode of trial may now be taken to have, at least in the British Empire, outlived its days of usefulness. It is of course not the habit of Parliament readily to part with any weapon in its political armoury, simply because it may appear to be a little out of date. But this particular weapon seems to-day to be more than that—it is obsolete.

27. So far I have taken the irresponsibility of the State and the Supreme Executive as my text for defining the legal position of both. To both, however it is usual to attribute another character which gives greater amplitude to their legal relations and confers on them a status peculiarly their own. The State is inviolable everywhere, and so, in monarchical countries, is the person of the King. The law of treason has not rarely been stretched to afford extraordinary protection to less exalted functionaries, to legislators, judges and

Inviolability  
of the State  
and of the  
Supreme  
Executive.



Treasons originally confined to enemy acts against the State by a subject and punished by single acts of State.

ministers of the King. But the original purpose of that law seems everywhere to have been to punish traitors to the State itself—citizens who had turned public enemies. Ancient communities invariably dealt with traitors as with public enemies by special acts of State—single acts by which the State avenged itself on the wrongdoer (a). The law of treason of many countries still bears traces of it in the exceptional procedure by which such crimes may be prosecuted and the “afflictive” punishments by which they may be visited upon conviction (b).

Composition for a King's life in early Anglo-saxon law.

28. Anglo-Saxon law set a high value on the life of the King. The composition (*wergeld*) for the King's life, in Anglia, was 30,000 thrimsas (£ 1,300), for the prince's 15,000, for a bishops' or alderman's 8000, for a sheriff's 4,000, for a thane's or cleric's 2,000, for a churl's 266 (c). But taking the King's life, though eminently risky in those days of blood-feuds, and highly expensive at best, was yet no treason. But killing the King must have become a ‘bot’-less offence long before Alfred's time, for that King made even *plotting* against the King's life a crime punishable with death. That “a divinity did hedge the King” in Rome seems indubitable, for an attempt on the safety of a Roman Magistrate was in Republican times accounted treason (*perduellio*). The life of the Magistrate who held the *imperium* was made by the law as sacred as the life of the State itself (d). The person of the Tribune was made inviolable under even stronger sanctions. Physical compulsion, blows, an attempt at

Treason law in Alfred's time implied inviolability of King's person.

Inviolability of the persons of Magistrates in Republican Rome.

(a) Maine, *Ancient Law*, Ch. X.

(b) See *Encyclopedia Britannica*, 11th Edn., Article on Treason. Treason, in the Middle Ages, was not clergyable. Its commission entailed forfeiture to the King and not as in felonies to the Lord. The punishment for treason in England until recently was extremely brutal. Until 1790, women prisoners could be carried to the place of execution and burnt and male prisoners drawn, hanged and disembowelled before they were quite dead until 1814. Trials for treason before the Act of 1695 were held according to a procedure which made it impossible for the accused to have a fair defence. See Pollock and Maitland, *History of English Law*, Vol. II, pp. 500-511; and Jenks, *Short History of English Law*, pp. 344-345.

(c) Stubb's *Select Charters*, p. 63, quoted in Carter's *History of English Legal Institutions*, 3rd Edn, p. 14.

(d) Greenidge, *Roman Public Life*, p. 191. (Read also Fustel de Coulanges, *The Ancient City*, Book III, Ch. IX),

murder, even resistance to a Tribune's will were *majestas*—"the infringement of the greatness of the State" (a). It was indeed Rome which gave shape to that on which the law of treason of modern European monarchies has rested. Alfred's indebtedness to Roman law in his legislation concerning treason seems obvious (b). But that law was fully developed not under the Republic but under the Empire.

29. The inviolability of the person of the King in ancient societies was the outcome neither of sycophancy nor of arrogance. There come stages in the evolution of society when the life of a nation becomes indissolubly bound up with the life of its King. In times when the Royal authority is in fact the only bond which can keep the loose-knit elements of society together, the life of the nation does really depend on the life of the King, and killing the King is in very truth the planting of a knife in the heart of the nation itself. There is therefore nothing unusual in the laws of a nation at certain stages of its existence erecting offences against the person of the King into treasons, and when this has happened people have willingly acquiesced in it.

Inviolability of the King a necessity in early politics.

30. But the treason laws of monarchic countries have seldom stopped at this point. Both in Rome and in Modern European monarchies, the law of treason grew and expanded under Royal auspices beyond all bounds of reason and necessity. Under the Roman law of the Empire, besides military offences, the raising of an army or levying war without the Emperor's command, questioning the Emperor's choice of a successor, murder of or a conspiracy to murder hostages and certain magistrates of high rank, the occupation of public places, the meeting within the city of persons hostile to the State with weapons or stones, incitement to sedition or administration of unlawful oaths, release of prisoners justly confined, even falsification of public documents, the failure of a Provincial Governor to quit his Province at the expiration of his office and to deliver his army to his successor were *majestas*. Intention was punishable equally with overt acts. Punishment of treason from the time of Tiberius was death (usually by

Its undue extension later in both Rome and modern European monarchies.

Penalty for treason in Rome.

(a) Greenidge, *Roman Public Life*, p. 100.

(b) See Maine, *Ancient Law*, Ch. X.

beheading) and confiscation of property coupled with complete civil disability (a).

Expansion of  
the law of  
treason in  
Feudal  
Europe.

31. In Feudal times, "treason", say Messrs Pollock and Maitland, "was a crime with a vague circumference and more than one centre". A man who aided the enemies of the nation was from very ancient times, as he deserved to be, hanged. Flight from battle was a capital crime under the *Leges Henrici* as under ancient German customs. But the feudal bond of fealty proved the most fruitful source of treason laws in the Middle Ages (b). It was not altogether a new invention, for in Rome the client who failed in his duties towards his patron was guilty of *perduellio* (c). Various breaches of the vassal's troth became treason in the Middle Ages, petty treason in the case of the lord, high treason when it concerned the King. Adultery with the lord's wife and violation of his daughter became treasons. Worse still, nobody knew the limits to which the law might be stretched by judges anxious to prove the majesty of the King before the eyes of his people. In England in 1252 Parliament demanded that the offence be defined and made cognoscible. Accordingly a statute of that year proceeded to declare the following acts to be treason: (1) compassing or imagining the death of the King, the Queen or their eldest son and heir; (2) violating the Queen, the King's eldest unmarried daughter, or his eldest son's wife; (3) levying war against the King in his realm or adhering to his foes; (4) counterfeiting the King's coin or seal, and (5) slaying the Chancellor, the Treasurer or the King's Judges while in the discharge of their duty—the last two provisions bearing evident traces of borrowings from Roman law. By judicial interpretation, "compassing or imagining the King's death" was construed to mean any act directed to the deposition or imprisonment of the King or to acquiring the control of his person, or any measure concerted with foreigners for an invasion of the Kingdom or going or intending to go abroad for such purpose, whilst cases of mere riot even were treated as "levying war" against the King (d). Two centuries later, a subservient Par-

In England.

(a) See article on Treason by William Fielden Craies in the *Encyclopedia Britannica*, 11th Edn.

(b) *History of English Law*, Vol II, p. 503.

(c) *Greenidge, Roman Public Life*, p. 8.

(d) In *Hale's Pleas of the Crown* Vol. I, p. 134, is mentioned a case which

liament suffered any act, thing or thought to be made a treason, of which the sovereign for the time being particularly disapproved (a). When along with this it is remembered that until 1596 proceedings against persons accused of treason lacked the ordinary guarantees of a fair trial, and that the punishments dealt out to persons convicted at such trials were, until the beginning of the 19th century, the most brutal imaginable (b), the history of the law of the treason in England until very recent times must be acknowledged to have been one of the darkest chapter of her legal and social history.

32. Up to 1795, the person of the monarch had so completely overshadowed the State that the law of treason took no cognisance of offences against the State which could not be construed to be also offences against the person or personal authority of the King. In 1795, and actual or contemplated forcible attempt to make the King change his counsels, or

Complete identification of State and King for purposes of the law of treason.

occurred in the reign of Charles II, in which a body of persons who gathered in warlike array and marched with flags and weapons to tear down bawdy-houses were held guilty of levying war. Sir Mathew Hale had refused to join in the judgment. Most of the extensions of the law of treason by judicial interpretation were given statutory force by a statute of 1795 made perpetual in 1817. See Anson, *Law and Custom of the Constitution*, Vol. II, 3rd Edn, p. 244.

Emergence in recent times of treasons not connected with King's person.

(a) In 1534, a statute of Henry VIII made it treason not to believe Mary illegitimate and to believe Elizabeth legitimate. In 1536, another statute made it treason to believe either of them legitimate and another of 1543 to believe neither legitimate. These statutes were of course intended to secure the succession to the throne of approved heirs. By later statutes, endeavouring to hinder or deprive the person next in succession to the Crown under the Act of Settlement from succeeding or by writing or printing maintaining that any other person is entitled to the Crown were made treasons. Halsbury, *Laws of England*, Vol, IX, p, 450,

(b) The sentence in the case of a man was that the offender be drawn on a hurdle to the place of execution and there be hanged by the neck but not till he be dead, and that while yet alive he be disembowelled and that then his body be divided into four quarters, the head and quarters to be at the disposal of the Crown. Until 1790, at common law a woman was carried to the place of execution and burned. In 1790, hanging was substituted for burning for female traitors. In 1814, the part of the sentence relating to hanging and disembowelling was altered to hanging until death supervened, Drawing and beheading and quartering after hanging were abolished in 1870, The Forfeiture Act of 1870 abolished attainder and forfeiture for treason except where the offender had been outlawed. See the Article on Treason in the *Encyclopedia Britannica*, 11th Edn,

to intimidate both Houses or either House of Parliament was made treason (a),

Recent amelioration of treason-laws in England,

33. In 1848, the offences which had previously been regarded as high treason, with the exception of those actually committed against the Sovereign, were made treason-felony and so not necessarily punishable with death (b). In the result therefore treason, under the present law, as distinct from treason-felony, is the doing or designing anything which would lead to the death, bodily harm or restraint of the King, levying war against him, adhering to his enemies, or otherwise doing acts which fall under the statute of Edward III ; whilst conspiracies to levy war, to deprive the King of the Crown, or of any part of his dominions, or to incite foreigners to invade the Realm, and force contemplated or applied to make the King change his counsels or to intimidate either House or both Houses of Parliament are treason-felony (c). By this device as also by the Riot Act of 1715, which gave Government power to deal with rioters as felons, more humane punishments were provided for lesser degrees of crimes against the State and the person of the King, whilst, as previously noticed (d), capital sentence when awarded upon conviction for treason can no longer be carried out with those circumstances of barbarity which specially marked the Medieval English law of treason. Forfeiture for treason too, as already noticed (d), has been abolished. On the other hand the Treason Act of 1842 made it high misdemeanour punishable by penal servitude for seven years wilfully to discharge, point, aim or present at the person of the King any gun or other arm loaded or not or to strike at or attempt to throw anything upon the King's person

Minor offences against the person of the King made misdemeanour,

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(a) Anson, *Law and Custom of the Constitution*, Vol. II, 3rd Edn, p. 244. Shortly before this, at the trial of Lord George Gordon arising out of the "No Popery Riot" of 1780, Lord Mansfield had spoken of two kinds of levying war : (1) against the person of the King ; (2) against his prerogative, against the power of Parliament which he represents, so that to restrain the King by force of arms from reigning according to law constitutes treason, Howell, St. Tr. XXI, pp. 486-651,

(b) The punishment for treason-felony is penal servitude for life or for not less than three years or imprisonment with hard labour for not more than two years. Halsbury, *Laws of England*, Vol. IX, p. 458,

(c) Anson, *Law and Custom of the Constitution*, Vol. II, 3rd Edn., pp. 244-245.

(d) See p. 359, footnote (b) *supra*.

or to produce any fire-arm or other arm or any explosive or dangerous matter near his person with intent to injure or alarm him or to commit a breach of the peace. Misprision of treason was and still is a common law misdemeanour punishable with imprisonment for life, forfeiture of goods and of the profits of land for life (a).

Misprision  
of treason.

34. Sedition, under English law, is conceived of as a crime against the Government rather than against the King. Every person is guilty of the common law misdemeanour (1) of seditious conspiracy who agrees with some one else (not being his or her wife or husband) to do any act for the furtherance of a common seditious intention, e. g., to hold a public meeting for the purpose of disturbing the public peace or raising discontent and disaffection or exciting hatred and contempt of the Government; and (2) of seditious libel if, with seditious intention, he either speaks or publishes any words or publishes a libel. The punishment for these offences is imprisonment without hard labour for a period not exceeding two years with or without a fine (b). Seditious words with regard to the administration of justice in a Superior Court, whether spoken in or out of court, are punishable by indictment or information, or summarily by attachment for contempt by the Court whose proceedings are defamed (c).

Sedition law  
of England.

35. It is easy to regard such offences as wilfully and maliciously setting fire to or burning or otherwise destroying His Majesty's arsenals, magazines, dockyards, vessels of war and certain other Government property or causing, aiding, procuring, abetting or assisting such burning or destruction (which are punishable with death), inciting soldiers and sailors to mutiny, the formation of secret societies and the administration of unlawful oaths, unauthorised drilling and practising military exercises, and even riotously pulling down churches, chapels, meeting houses and other buildings and tumultuously petitioning the Crown or either House of Parliament, as offences against the State (d). But what I have said already is enough, without actually encroaching upon the domains of

Other treasonable  
crimes,

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(a) Halsbury, *Laws of England*, Vol. IX, p. 503.

(b) *Ibid*, p. 460-461.

(c) Halsbury, *Laws of England*, Vol. IX, p. 461. The last-mentioned course is stated to be what is now usually adopted.

(d) See Halsbury, *Laws of England*, Vol. VI, pp. 357-8.

Treason law of the United States uninfluenced by English traditions,

It is not an offence against the person of the Chief Magistrate.

Other offences against the State crimes not treasons.

criminal law, to show the kind of protection the criminal law of England throws round the State and the person of the King.

36. The elimination of the Crown from the constitution of the United States brought to the ground in that country the whole structure of the treason law of England centred as it was round the person of the King. By Art III. sec. 3, the constitution defined treason against the United States as consisting only in "levying war against them or in adhering to their enemies, giving them aid and comfort" (a), and it was declared that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court. The Congress was given power to declare the punishment of treason (b) but it was laid down in this section that no attainder of treason was to work corruption of blood, or forfeiture except during the life of the person attainted. Treason under American law is thus an offence against the State and not an offence against the individuals entrusted with the powers of government. Murderers of Presidents have accordingly been prosecuted for murder but not for treason (c).

37. The constitution of course left it open to the legislature to define and punish other crimes against the State, but as crimes only and not as treasons. Thus inciting or engaging in rebellion or insurrection, criminal conspiracies with foreign Governments in relation to disputes or controversies with the United States, seditious conspiracy, and recruiting soldiers and sailors for enlistment to serve against the United States have been made crimes by Act of Congress (d). On February 14, 1917, Congress enacted a law

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(a) "Levying war" has been judicially interpreted to include meeting openly in armed array" (not merely as secret conspirators) with the purpose and intention of nullifying or preventing the execution of a general law of Congress, not merely for some personal private ends but with the idea of nullifying the law in all cases, even though but one law is aimed at and even though not complete overturning of the Government is the object, *Vigol's case*, 28 Fed. Cas. 376; *Mitchell's case*, 26 Fed. Cas. 1277; *Fries' case*, 9 Fed. Cas. 926; *Hoxie's case*, 26 Fed. Cas. 397. Is the discouragement of recruiting or incitement to strike of war-workers in war-time "adhering to enemies or giving them aid and comfort."

(b) An Act of Congress of 1790 made treason against the United States punishable with death by hanging.

(c) Emlin McClain in the *Cyclopedia of American Government*, Title, "Treason"

(d) *Encyclopedia Britannica*, 11th Edn, Title, *Treason*.

providing punishment of any person knowingly or wilfully making a threat to take the life of, or inflict bodily harm upon, the President of the United States. The offence, it has been judicially held, is complete even though the threat has not been communicated to the President (a).

38. What is the law of treason applicable in the British colonies and dependencies? The extent to which English law applies to a particular colony or possession has been correctly stated to depend primarily upon the manner in which that colony or possession became subject to the Crown (b). "There is a great difference between the case of a colony or possession acquired by conquest or cession in which there was at the time an established system of law and that of a colony or possession which originated by the settlement of British subjects in territory unoccupied by any civilised State, and where there was no established system of law at the time it was peaceably annexed to the British Dominions (c). In the latter, the common law of England and the statute law as existing at the date of the formation of the colony apply, but not statutes subsequently enacted unless they are expressly directed to apply, subject however to the restriction that so much only of the law of England is carried with them by the colonists as is applicable to their situation and the condition of an infant colony (d). As to even the former, in some cases the laws of England have been expressly applied to the conquered territory with similar effect, as for instance in Grenada, St. Vincent, Dominica, St. Lucia, the Gold Coast, Gibraltar and Cyprus (except as to Ottoman subjects) (e). In Penang, no trace being found of any laws established before its acquisition by the East India Company, the same rule has been applied (f). In other colonies, the laws previously in operation have been left in force, except so far as they may have been altered by subsequent legislation. Thus in Ceylon (except in so far as the

Treason law in British colonies and dependencies.

English law how far applies in different classes of colonies.

(a) *United States v. Stickrath*, 242 Fed. Rep., p. 151.

(b) Mr. Tarring in Halsbury's Laws of England, Vol. X, Title, Dependencies and Colonies, p. 565.

(c) *Ibid.* Also *Cooper v. Stuart*, 14, App. Cas. 286, 291, P.C. (1889).

(d) Halsbury, Laws of England, Vol. X, pp. 568-569.

(e) *Ibid.*, p. 567.

(f) *Ibid.*, p. 567.



And in India,

personal laws of the Hindu and Mahomedan inhabitants have been allowed to be retained by them to govern matters of inheritance etc.), the Cape of Good Hope, Natal, the Transvaal and the Orange Free States, the Roman Dutch law prevails and this is also the case with British Guiana which formerly was a Dutch possession, but except in South Africa the criminal law in all of them is at present substantially English (a). In Mauritius, the law applicable at the time of its annexation and now is mainly French. In Quebec, English criminal law quickly (in 1774) superseded the French (b). In Trinidad, the old Spanish law as it stood in 1797 is still said to be in force (c), but this appears to be true only of laws governing civil relations, the criminal law being apparently English by legislation (d). In the matter of the application of English law to dependencies, India from the beginning was treated as *sui generis*, since there was in that country when annexed by the British Crown a system of law adapted to the requirements of the indigenous population but unsuited to European requirements. The course adopted appears from the Master's Report in *Freeman v. Fairlie* (e) to have been "to treat the case in a great measure like that of a newly discovered country for the government of the Company's servants and other British or Christian settlers using the laws of the Mother Country, as far as they were capable of being applied for that purpose, and leaving Mahomedan and Gentoo inhabitants to their own laws and customs, but with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse." By the Royal charter of 1726 establishing Mayor's Courts in the three Presidency towns of Calcutta, Madras and Bombay, all unrepealed

(i)  
In Presidency  
towns.

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(a) Halsbury, Laws of England, Vol. X, pp. 567-68. See also Burge's Colonial Laws and Courts, re-edited by Renton and Phillimore, 1907, under respective headings. The Penal Code of Ceylon is based on the Indian Penal Code which itself is English. The Civil Law of British Guiana Ordinance of 1916 has virtually displaced Roman Dutch law by English common law except as to real property. See Journal of the Society of Comparative Legislation, N. S., No 39, p. 218.

(b) Burge's Colonial Laws and Courts, re-edited by Renton and Phillimore, 1907, pp. 199-207.

(c) *Ibid.*, pp. 229-230.

(d) Halsbury, Laws of England, Vol. X, pp. 220-230. And Burge's Colonial Laws and Courts, 1907, p. 247.

(e) 1 Moo. I.A. 305 (1828) at p. 324.

Acts of Parliament prior to that date together with the common law of England as it existed at that date, so far as such Acts and such law were applicable to local circumstances, were given the force of law in those towns (a). There was no such express application of the common and statute law of England to the territories subsequently annexed and lying outside these towns. Though the Indian legislatures now have almost plenary powers of legislation over all persons and things in India, the question whether any portions of the English common and statute law in force at the dates of the annexation of various portions of Indian territory apply of their own force to those territories is by no means yet (as I shall presently show) a wholly academical question (b).

(ii)  
Outside.

39. So far as the law of treason is concerned, the English law as it was in 1879 appears to have been adopted as the law in Canada and New Zealand. In Australia, the law applicable is the law of England as it stood when the States were colonised except in Queensland and West Australia where the English statutes were re-drafted and applied from 1899 and 1902 respectively. In Ceylon, the Straits Settlements and Hongkong, statutes have been framed on the lines of the Indian Penal Code. In the West Indies, the Roman Dutch law has been superseded by laws framed on English lines. In South Africa, the Roman Dutch law in force distinguishes between high treason and *vis publica*, that is, insurrection and riot endangering public peace and order.

Treason law  
(i) in Canada  
New Zealand  
and Australia.

(ii) In Asiatic  
Colonies,

(iii) In the  
West Indies.

(iv) in South  
Africa.

40. As regards India, Chapter VI of the Penal Code of 1860 is popularly assumed to contain the whole of the Indian law of major offences against the State. Chapter VII deals with offences relating to the Army and Navy and sec. 505 cl. (a) (making the publication and circulation of rumours, statements or reports with intent to cause or which is likely to cause any

(v) In India.

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(a) Halsbury's Laws of England, Vol. X, p. 614.

(b) See in this connection the following cases:—*Freeman v. Fairlie*, 1 Moore Ind. App. 305 (1828); *Mayor of Lyons v. E. I. Company*, 1 Moore Ind. App. 175 (1836); *Advocate General of Bengal v. Ranees Surnomoyee*, 9 Moore Ind. App. 387 (1863); and Lord Stowell's judgment in "*The Indian Chief*" (1801) 3 Rob. Adm. Rep. 12. The erudite, though necessarily partisan, arguments of counsel in *Ameer Khan's* case, not fully reported in 6 B. L. R. 392 (1870), in Messrs. Cambray and Company's reprint may also be usefully studied.

"Offences  
against the  
State" in the  
Penal Code.

officer, soldier or sailor in the Army or Navy of His Majesty or in the Royal Indian Marine or in the Imperial Service troops to mutiny or otherwise disregard or fail in his duty as such, an offence punishable with a maximum sentence of two years' rigorous imprisonment) provides for less serious offences of the same description. But the only offences of a treasonable character dealt with in Chapter VI are *inter alia* (i) waging or attempting to wage war or abetting the waging of war against the King—an offence punishable with death or transportation for life and forfeiture of property (sec. 121), (ii) conspiracy to commit the above offences or to deprive the King of the sovereignty of British India or any part thereof, or by means of criminal force or show thereof to overawe the Government of India or any Local Government (sec. 121 A), (iii) collecting men, arms or ammunition or otherwise preparing to wage war (sec. 122), (iv) bringing or attempting to bring into hatred or contempt or exciting or attempting to excite disaffection towards His Majesty or the Government established by law in British India by seditious speeches, writings, signs or visible representations or otherwise (sec. 124 A)—all of which are punishable by transportation for life or terms of imprisonment (simple or rigorous), and in the last two cases by sentences of forfeiture and fine in addition respectively, (v) concealing the existence of a design to wage war against the King intending by such concealment to facilitate or knowing it to be likely to facilitate the waging of war—an offence which is made punishable by a maximum sentence of 10 years' rigorous imprisonment besides fine. A public servant allowing a State prisoner to escape (i) voluntarily (sec. 128) is punishable by transportation for life or imprisonment of any description which may extend to 10 years besides fine, and (2) negligently, (sec. 129) by simple imprisonment for a term which may extend to 3 years and fine. Any person aiding the escape of, or rescuing or harbouring a State prisoner may be punished with transportation for life or imprisonment of either description for a term extending to 10 years, besides fine (sec. 130). But the most characteristic provision in the whole chapter is sec. 124 which provides that whoever, with the intention of inducing or compelling the Governor General, a Governor, Lieutenant-Governor or Member of Council to exercise or refrain from exercising any lawful power of such Governor General,

Includes per-  
sonal injury  
or threat  
thereof to  
certain high  
functionaries.

Governor, Lieutenant Governor or Member of Council, assaults or wrongfully restrains or attempts wrongfully to restrain or overawes by means of criminal force or show of criminal force, or attempts so to overawe, such Governor General, Governor, Lieutenant Governor or Member of Council, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

41. Offences against the person of certain high officials in India, if made with the intention of compelling them to exercise their lawful powers are thus by this last mentioned section constituted State offences, but offences against the person of the King are nowhere dealt with in the Code or in any other Indian statute. At the time the Indian Penal Code became law, the possibility that the King might visit India was presumably not within the contemplation of its framers, and it was in consequence not considered necessary to codify the law of high treason for India. I do not think however that the Parliamentary statutes dealing with offences against the person of the King can be so interpreted as to limit their application to offences committed within the confines of the United Kingdom only, or that the omission to codify the law of high treason in the Penal Code makes any difference in the application of that law in India. Still it would be distinctly desirable that the inviolability of the King Emperor, a fundamental fact of British constitutional law, should find independent expression in an Indian statute.

Offences against the King not dealt with in Indian enactments.

English treason law touching the King's person probably applies in India.

42. The treason laws of the countries on the Continent of Europe having been codified are on the whole simpler and more rationally conceived than that of England, as will appear from the following abstract appearing in the article on Treason in the Encyclopedia Britannica (11th Edn.). In France, by the Code Penal, treason falls under the head of crimes against the safety of the State (Bk. III, Tit. I. C. 1.). It is a capital offence for a Frenchman to bear arms against France (sec. 75), or to plot with a foreign power or its agents to commit hostilities or undertake war against France whether war follows or not (sec. 76), or to intrigue with the enemies or the State for facilitating their entry into French territory or to deliver to them French ships or fortresses or to supply them with munitions of war to aid the progress of their arms in French possessions or against French forces by sea or land (sec. 78),

Treason law

(i) of France.

(ii) Of  
Germany.

Germany distinguishes between high treason and treason. High treasons are (1) Murder or attempt to murder the Emperor or a federal Sovereign in his own State or during the stay of the offender in the Sovereign State (sec. 80), (2) undertaking to kill, take prisoner, or deliver into an enemy's power, or make incapable of government a Federal Sovereign in his own State or during the stay of the offender in the Sovereign State (sec. 80), (3) to change by violence the constitution of the Empire or a State thereof or the successor to the throne therein, (4) to incorporate by force the Federal territory or the territory of any such State with a foreign State or Federal State (sec. 81). The Code treats as treason but does not punish by death the offences included in the French Code, (secs. 87-89), and in certain circumstances punishes alien residents for these offences (sec 91). The Code also punishes insults on the Emperor and Federal Sovereigns (secs 95, 97).

(iii) Of Italy.

43. By the Penal Code of 1888 (Tit. I. C. 1.), treason in Italy includes direct acts to subject Italy or any part thereof to foreign domination or to diminish its independence or break up its unity (sec. 104), to bear arms against the State (sec. 105) or intrigue with foreign States with the object of their levying war against Italy, or helping them in such war (sec. 106), or to reveal political or military secrets affecting the national independence (sec. 107). The Spanish Code distinguishes between treason and rebellion. Under the former are included assassination or attempts on the life or personal liberty of the King (arts. 158, 159) or insults to the King (arts. 161, 162). Under rebellion are included violent attempts to dethrone the King or to interfere with the allegiance to him of his forces or any part of the realm (c).

(iv) Of Spain.

A comparative estimate of the treason laws of the world.

44. From the foregoing summary of the treason law of the most important States of the world, it appears that whilst the treason laws of the two republican countries of France and the United States are confined in their application to offences against the safety and integrity of the State, those of monarchical countries are extended to afford protection also to the person of their hereditary chiefs and to their successors in office under the law. In England, as in Imperial

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(c) See Mr. Craie's Article on Treason in the *Encyclopædia Britannica*, 11th Edition.

Rome, some high functionaries, e.g. the Chancellor, the Treasurer (an office now obsolete) and Royal Judges also are protected by the law of treason—a provision which, though it has been suffered to remain untouched on the Statute Book, is not likely to be extended to other incumbents of State offices however exalted. The provisions of the Act of 1795 which made it a treasonable offence to intimidate the Parliament are not altogether singular, for Art. 43 of the constitution of Denmark makes the Rigsdag inviolate and all persons who assail its security or freedom or issues or obeys an order for such a purpose is made punishable for treason, whilst Art. 110 of the constitution of Sweden besides making offences against the Rigsdag treason provides that assaults on members going to or from a sessions shall be punishable as assaults on a King's officer. Still, on the whole, the contents of the treason law of England appear at this moment to be of the amplest—a state of things which finds a sufficient explanation in the peculiarly English habit of allowing worn out provisions of ancient statutes to remain on the Statute Book long after they have become obsolete for all practical purposes. The identification of the King with the State, whilst it materially aided in the development of the law of crimes, did undoubtedly at the same time lead to an undue stretching of the law of treason, with its savage penalties and iniquitous procedure for trials, so as to make it cover cases of ordinary crimes more or less serious. The time has certainly come in England for a more scientific differentiation of ordinary crimes from offences against the State proper, than is afforded by the English law distinction of treasons, treason-felonies and treasonable offences. For reasons already indicated the treason laws of the English colonies and dependencies share in the merits and defects of the law of the Mother Country. Of the law of India, it need only be stated that the Indian Penal Code was passed ten years before the English Act abolishing forfeiture for treason. Forfeiture of property follows on a conviction under the Indian law for the offences of waging war or attempting to wage war, conspiring or collecting arms etc. to wage war or abetting the waging of war against the State (secs. 121, 122).

45. From the foregoing discussion, it appears that the irresponsibility and inviolability of the Chief Executive cons-

(ii) Of  
Germany.

Germany distinguishes between high treason and treason. High treasons are (1) Murder or attempt to murder the Emperor or a federal Sovereign in his own State or during the stay of the offender in the Sovereign State (sec. 80), (2) undertaking to kill, take prisoner, or deliver into an enemy's power, or make incapable of government a Federal Sovereign in his own State or during the stay of the offender in the Sovereign State (sec. 80), (3) to change by violence the constitution of the Empire or a State thereof or the successor to the throne therein, (4) to incorporate by force the Federal territory or the territory of any such State with a foreign State or Federal State (sec. 81). The Code treats as treason but does not punish by death the offences included in the French Code, (secs. 87-89), and in certain circumstances punishes alien residents for these offences (sec 91). The Code also punishes insults on the Emperor and Federal Sovereigns (secs 95, 97).

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(c) See Mr. Craie's Article on Treason in the *Encyclopedia Britannica*, 11th Edition.

Rome, some high functionaries, e.g. the Chancellor, the Treasurer (an office now obsolete) and Royal Judges also are protected by the law of treason—a provision which, though it has been suffered to remain untouched on the Statute Book, is not likely to be extended to other incumbents of State offices however exalted. The provisions of the Act of 1795 which made it a treasonable offence to intimidate the Parliament are not altogether singular, for Art. 43 of the constitution of Denmark makes the Rigsdag inviolate and all persons who assail its security or freedom or issues or obeys an order for such a purpose is made punishable for treason, whilst Art. 110 of the constitution of Sweden besides making offences against the Rigsdag treason provides that assaults on members going to or from a sessions shall be punishable as assaults on a King's officer. Still, on the whole, the contents of the treason law of England appear at this moment to be of the amplest—a state of things which finds a sufficient explanation in the peculiarly English habit of allowing worn out provisions of ancient statutes to remain on the Statute Book long after they have become obsolete for all practical purposes. The identification of the King with the State, whilst it materially aided in the development of the law of crimes, did undoubtedly at the same time lead to an undue stretching of the law of treason, with its savage penalties and iniquitous procedure for trials, so as to make it cover cases of ordinary crimes more or less serious. The time has certainly come in England for a more scientific differentiation of ordinary crimes from offences against the State proper, than is afforded by the English law distinction of treasons, treason-felonies and treasonable offences. For reasons already indicated the treason laws of the English colonies and dependencies share in the merits and defects of the law of the Mother Country. Of the law of India, it need only be stated that the Indian Penal Code was passed ten years before the English Act abolishing forfeiture for treason. Forfeiture of property follows on a conviction under the Indian law for the offences of waging war or attempting to wage war, conspiring or collecting arms etc. to wage war or abetting the waging of war against the State (secs. 121, 122).

45. From the foregoing discussion, it appears that the irresponsibility and inviolability of the Chief Executive cons-



Irresponsibility of the Chief Executive does not give his wrongful acts legal validity.

titute the factors which together or by themselves give him a status in law peculiarly his own. It seems hardly necessary to repeat that the irresponsibility of the Chief Magistrate before the law for his wrongs does not make those acts or others done in his name legal. From the maxim "the King can do no wrong" the conclusion does not follow that whatever the King does or authorises others to do is valid in law. The whole modern doctrine of ministerial responsibility is a repudiation of that conclusion. The maxim, according to the interpretation it has received in England and on the Continent of Europe, merely deprives the aggrieved subject of his remedy in case the wrong follows from a personal act of the King. An act of a Minister performed in the name of the Chief Executive, except in cases where a defence in bar that it is an "act of State" is allowed, is, if in excess of his legal authority, open to review by courts of law, ordinary or administrative. In the Federal Government of the United States of America alone has been felt any hesitation to draw this conclusion, but here also opinion seems to be divided (a).

Acts of the irresponsible Chief Executive may be collaterally attacked in courts of law.

46. From the above, it follows that though there may be no remedy against the Chief Magistrate personally for wrongs done by him, his acts and orders are subject to examination and collateral attack in courts of law at the instance of persons aggrieved thereby. Upon this matter too, the Federal Government of the United States is the only one with reference to which the courts have developed the principle that they will not review the President's acts where the attempt will bring them in direct conflict with him. Such acts apparently done in the exercise of his police powers thus assume the importance of "political" acts, which of course are not open to review by the courts of law. The Governors of States, however, apparently have not been treated with the same consideration everywhere; but the better rule is

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(a) In *Durand v. Hollins*, 4 Blatchford 451, it was suggested that subordinates of the President executing orders issued in the discretion of the President are like the President protected from action. But Mr. Garner writing in the *Cyclopedia of American Government* (Title—Judicial Power, Theory of,) takes it as settled law that the order of the President cannot be pleaded by his subordinates in defence of acts done by them in violation of laws. Cf. sec. 111 of the Government of India Act of 1915 as to which see *supra*, para 18.

stated to be that the courts will not attempt to control a Governor's action by attempting to exercise direct restraint over him (a).

47. In the foregoing treatment of the legal position of the Chief Executive in several countries, I had incidentally to refer to the legal position of the Executive Councillors in some of them. In a previous lecture I tried to discriminate between two kinds of Executive Councils, e. g., Cabinet and non-Cabinet. The position of Cabinet Councillors in law is not distinguishable from that of Ministers in general, whilst Ministers in States such as Germany and the United States are, in fact as well as in theory, ministers and servants of the Chief Magistrate and are not Councillors in any sense. A consideration of the legal position of Executive Councillors as such must therefore be limited to Councillors who are in law colleagues of the Chief Executive. The members of the Council of the Secretary of State for India and of the Executive Councils of the Governor General and Governors in India occupy such a position to a certain extent, and, as previously pointed out, by statute, share in the immunities and privileges, such as they are, of the Chief Executive. The members of the Bundesrath in Germany might conceivably have had some such privileges, but I do not find that they enjoy any immunities other than what they derive from being members of a legislative chamber—a circumstance which I take to point to their essentially subordinate position in the constitution, in spite of the claim of German writers like Zorn that the German Empire is a Federal Republic. The Swiss Federal Council is perhaps the only supreme executive college in existence to day. But the Councillors do not appear to enjoy the absolute immunity from action of the Supreme Executive of other countries. The aggrieved citizen has, however, in the first instance to complain before the Federal Assembly. If the Federal Assembly should reject the application, the applicant

Legal position  
of Executive  
Councillors.

(i)  
In India.

(ii)  
In Germany.

(iii)  
In Switzer-  
land.

(a) Mr. Garner in his Article on "Judicial Power, Theory of" in the *Cyclopedia of American Government* notes that courts in the United States have consistently refused to issue writs against the President, but they have been issued against the Governor in some but not in other States, but the preponderance of practice is against the issue of writs against him. See also Goodnow, *Comparative Administrative Law*, Vol. I, pp. 73, 74. 82.

may sue the Councillor, but in that case the Confederation assumes responsibility for the act of its functionary (a).

## LECTURE XV. OF MEMBERS OF THE LEGISLATURE.

Intimidating the legislature regarded as treason in some countries.

Privileges and immunities of legislators, sufficient to constitute a status.

They have originated in England.

And in modern times.

How far necessary in the public interest.

(i) Freedom of speech and debate.

1. I noticed, in the course of the last lecture, that an English statute of 1795 made treasonable *inter alia* attempts to intimidate the Houses or either House of Parliament, and that somewhat similar provisions occur in the Danish and Swedish constitutions. These and similar provisions, however, which do not occur in other constitutions, hardly furnish any adequate measure of the immunities and privileges generally enjoyed by members of legislative assemblies in modern constitutional governments. When these have been enumerated, it will, I think, be fairly clear that members of legislative assemblies as such do on the whole occupy in the scheme of government a status peculiarly their own.

2. Just as all modern constitutional governments are adaptations of a form which grew up spontaneously in England, and legislative bodies in all modern forms of government have been modelled more or less on the English Parliament, so too are privileges of members of the legislature in every country, such as they are, adaptations of rights and immunities which grew up within the English Parliament. It follows from this, that privileges and immunities of legislative bodies and their members are for this, if for no other reason, an essentially modern development.

3. That members of the legislature should, in the public interest, have certain rights, privileges and immunities, seems to modern ideas a self-evident proposition. If it be the business of these bodies not merely to enact and register legislative proposals placed before them by the executive but also by advice and criticism to keep them up to the mark, and seek to remove abuses not only in the administrative system but in every part of the body politic, it is absolutely necessary that they should enjoy a very large measure of liberty of speech within the House.

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(a) Lowell, *Governments and Parties in Continental Europe*, Vol. II, p. 220, n. 1.

But it does not, at least at first sight, appear to be quite as obvious why a member of Parliament as such should also be immune from arrest under civil and criminal processes, and nowhere in fact to-day is the immunity allowed in this respect altogether absolute. But the experience of legislators in England of the lengths to which Kings in the 16th and 17th centuries were prepared to go to put obnoxious members out of the way proves its necessity, at least in countries where Parliamentary government has not fully established itself.

(ii) Freedom from arrest.

4. Nor, be it remembered, were these privileges conceived by Royal statesmen communing within their own souls, and handed over by them as free gifts to legislators not yet appreciative of the value of these boons. They were wrung out of unwilling hands and as often taken back and wrested again.

How won.

5. *First*, as regards the right to freedom of speech and debate: In 1397, Sir Thomas Haxey was imprisoned by order of the King (Richard II) and found guilty of treason for having introduced a bill to regulate the Royal household. The proceeding, we are informed, was reversed by Henry IV and the Lords in 1399, and the privilege of free discussion was expressly recognised and confirmed again in 1407. So it needed the countenance of a usurper on the throne to secure the earliest official recognition of this privilege. But this recognition did not, in 1451, prevent Thomas Young from being imprisoned for introducing a motion to declare the Duke of York heir to the Crown, then in the futile keeping of Henry VI. The proceeding however was set right in 1455, when the Duke of York, now Protector, had the case referred to the Lords, on whose recommendation reasonable compensation was ordered by the King. But the leading precedent in the matter was set by Richard Strode.

(i) Freedom of speech and debate.

1399—1407.

6. For having "with other of this House" introduced into Parliament certain bills which the tinnors did not like, Strode was prosecuted in the Stannary Court, fined and imprisoned in default. On his petition, it was enacted in 1512 that the judgment and execution should be void and further that all suits etc. against him "and every other of the person or persons before specified that now be of this Parliament or that of any Parliament hereafter shall be for any bill, speaking, reasoning or declaring, of any matter or matters concerning the

Strode's Act 1512.

1541.

Parliament to be communion<sup>d</sup> and treated of be utterly void and of none effect." From 1541, the privileges of free discussion, free access to the King and freedom from arrest began to be formally claimed by the Speaker at the commencement of each Parliament and formally recognised by the Sovereign. Nevertheless, neither Elizabeth, nor James I, whenever it suited their Royal pleasure, hesitated to violate these privileges. The last fight for freedom of Parliamentary speech and debate took place in 1629 when Eliot, Hollis and Valentine were imprisoned by the King's Bench for alleged seditious speeches in Parliament and assault on the speaker, that Court having somehow persuaded itself that Strode's Act was declared to apply only to his particular case (a). These proceedings were reversed by an Act of Parliament, at the instance of Hollis who was still living, in 1667. This Act made Strode's Act general, and the judgment of the King's Bench also was formally reversed by the Lords on a writ of error in 1688. To put matters beyond all possible doubt, the Bill of Rights in that year declared that freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. From this time liberty of speech of members was attacked indirectly by dismissing the speakers from offices which they held under the Crown, but this practice too was abolished in 1765.

(ii)  
Freedom  
from arrest.

1404.

7. The progress of the privilege of freedom from arrest and molestation was even more chequered. It was from Henry IV again that in 1404 came the first Royal recognition of this privilege. In the following year John Savage who had assaulted a member's *servant* was mulcted in a double fine. With a King on the throne who depended for his title and tenure on the Parliament, the members evidently felt safe to press their claims a good deal beyond what was necessary, in the public interest. It was a weakness which, as will presently appear, grew with the growth of Parliament. In

(a) Thomas, *Leading Cases in Constitutional Law*, Fourth Edition, Note on p. 42. In the 15th and 16th centuries when Parliament was in point of fact as much a judicial as a legislative body, every private "Act" of Parliament was liable to be viewed as "a decision" in a particular case, binding only on the parties concerned and of value, as to others, only as a precedent. McIlwain, *High Court of Parliament and Its Supremacy*, p. 22.

1433, a statute declared double damages due for an assault on a member going to Parliament.

8. Previous to 1543, imprisoned members and their servants were released by special Acts of Parliament if imprisoned in execution of judgment; and by writ of privilege issued by the Chancellor, if imprisoned on mesne process. In 1543, however, in the case of George Ferrers, a member imprisoned as surety for a debt, the Commons demanded his release on their own authority through their sergeant, and the Sheriffs having refused to comply were imprisoned for contempt by the House which likewise held a writ of privilege from the Chancellor to be unnecessary declaring that the orders of the "Nether House" could be carried out without a writ by the sergeant "whose mace was his warrant." This action of the Commons, we are told, was supported by the King (Henry VIII). To what lengths this summary power of enforcing its fancied privileges was carried by the House in this and the following centuries will be presently shown. But, on the point of freedom from arrest: In 1642, Charles I entered the House of Commons, then sitting in debate, to arrest five members, Hampden, Haselrigge, Hollis, Pym and Strode for alleged treason. No privilege could be claimed when a member was charged with treason, but the King's action had been anticipated and the members had left before his arrival. The Commons who had already resolved on Civil War, now declared in anger that the King's action was a breach of privilege and his conduct "false, scandalous and illegal." Since then the question of privilege has not been in debate between King and Parliament. It has depended for further definition on Parliament and the courts (a).

Ferrers's case.  
Commitment  
for breach of  
privilege.

1543.

1642.

9. As to the extent of the privilege claimed by Parliament, if the vanity of Kings led to the expansion of the law of treason to the point of harshness, the vanity of members inflated the law of Parliamentary privilege to the uttermost limits of absurdity. In fact, the country squires who at this period contributed the bulk of its membership took themselves (as has been their wont in every country) altogether too

Extravagant  
claims of  
privilege.

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(a) For most of the facts of history set out above, see Fielden's *Short Constitutional History of England*, 4th Edn. 1911, pp. 103-113, and May, *Parliamentary Practice* (12th Edn.), Chs. III-V.

seriously. Armed with the power of summary commitment, the two Houses vied with each other in extending those limits. From the report in *Stockdale v. Hansard* (a), it appears that at different times, offenders had been compelled to make satisfaction or were taken into custody for "impounding a member's cattle, lopping his trees, detaining his goods, serving his tenants with process, taking his horse from a stable and riding it, digging his coal, ploughing his land, killing his rabbits, assaulting his porter, fishing in his pond, erecting a fence on his waste. On one occasion, an attorney was committed for delivering an exorbitant bill of costs for preparation of a petition to the House and for threatening to sue for the amount" (b). One is not surprised to learn that the claim of privilege was at its height in the reign of William III (c).

Arbitrarily  
enforced by  
summary  
commitment  
for contempt.

10. The Commons' power of summary commitment, first assumed in 1543, made privilege (during the session) more formidable than prerogative, "which must avenge itself by indictment or information involving the tedious process of law, while privilege with one voice, accuses, condemns and executes" (d). Did the prisoners committed by the House for contempt have no remedy in law? None, for the courts have consistently held that if a prisoner committed by the House obtained a writ of *habeas corpus* and the return to the writ was that he had been committed for a contempt of the House, the Court would inquire no further but would remand the prisoner to his goal (e). It would thus seem as if the House

Court power-  
less to grant  
relief.

(a) 9 Ad. and E. 1 (1839), at p. 12.

(b) Thomas, *Leading Cases in Constitutional Law*, p. 51, Note, and 9 Ad. and E. 1 (1839) at p. 12, Footnote (b).

(c) Maitland, *The Constitutional History of England*, 1913, p. 323.

(d) Per Lord Denman, C. J., in *Stockdale v. Hansard*, 9 Ad. and E., 1 (1839), at p. 156.

(e) *Lord Shaftesbury's case*, 6 St. Tr. 1269 (1677); *Burdett v. Abbot*, 14 East 1-163; 4 Taunt. 401; 5 Dow. 165 (1811); *Sheriff of Middlesex's case*, 11 Ad. and E. 273 (1840). The theoretical justification of this view is to be found in the fact that in the Middle Ages the High Court was a judicial body first and a legislative body by usurpation. "The High Court of Parliament" was indeed at this time the highest common law court of the land. Its privileges as such it retained through tradition long after it had ceased to perform judicial functions. See McIlwain, *High Court of Parliament and Its Supremacy*, pp. 229-246. In the *Sheriff of Middlesex's case*, what the Commons chose to regard as a breach of privilege was the execution against their reporter Hansard

had legal power to turn into a contempt just what it pleased, and there was no power on earth to say that it was either arbitrary, stupid or only mistaken in its judgment.

11. "A more justifiable use of the power of the House", says Maitland, "consisted in the punishment or attack directed not against individual members but against the House as a body. But even in this sphere the power was intemperately used". In 1701, the majority of the Commons' House having been slow to grant supply, the Grand Jury of Kent presented a respectfully worded petition begging them to grant the King the money he urgently needed for the prosecution of war. The House voted that the petition was scandalous and an attempt to destroy the constitution of Parliament and committed some of the petitioners to prison! James II's commitment of the Seven Bishops on charges of treason was reasonableless itself compared with the high-handed character of these proceedings. Through this power of commitment, each of the Houses, according to Maitland, gained a power of

An extreme case.

of a judgment awarding damages for a libel on the Plaintiff Stockdale contained in a report which Hansard had published on the authority of a resolution of the House. In that action, Hansard had taken the plea that the publication of the report was a privilege of the House regarded by it as such, and was not open to examination by the Court. Denman, C.J., who delivered the judgment of the court in that case overruled this plea and held that the Commons' House alone by a resolution could not make that legal which in fact was illegal, *Stockdale v. Hansard*, 9 Ad. and E. 1 (1839). The judgment in the *Sheriff's case* was also delivered by Denman, C. J., who whilst adhering to his decision in *Stockdale v. Hansard* was yet able to hold that he was unable to inquire into the grounds of commitment because the warrant of commitment did not specify the grounds upon which the Sheriff had been adjudged guilty of contempt by the House. The likeness of this decision to that in *Darnel's case*, 3 St. Tr. 1 (1627) (in which five Knights having been imprisoned for refusing to obey privy seals for forced loans to the King sued out *habeas corpus*, but a return in each case alleging that the prisoner was in custody by virtue of a warrant of the Attorney General which stated that he "was and is committed by the special command of His Majesty," was held sufficient) is obvious. English constitutional writers have been in the habit of stigmatising the judges who decided *Darnel's case* as having been unduly subservient to the King. An outsider like the present writer cannot help remarking that if the judges were subservient to Kings in the 17th Century, they were several degrees more so to Parliament in the 18th and 19th. The judgment of Lord Denman and his colleagues in the *Sheriff's case*, viewed in its proper perspective, is an unequivocal confession of impotence.

Subservience of courts to Parliament in 18th and 19th centuries.



Duration of  
commitments.

arbitrary imprisonment which had been denied to the Star Chamber. Fortunately however for both the House and the people who incurred its anger, imprisonment by order of the House could never be of very long duration. It ended with prorogation or dissolution in the case of the Commons, though not in the case of the Lords, who thus had power to imprison for fixed terms. But even they do not appear to have used this power harshly. The fact is that the Squirearchy which ruled the country from the 17th to the 19th century was by nature up to any degree of petty tyranny, but incapable of downright oppression.

Present extent of (i) privilege of freedom of speech, (ii) privilege of freedom from arrest.

12. Of the three species of Parliamentary privilege whose history I have traced, (i) freedom of speech and debate has stood the test best. As to (ii) freedom from molestation and arrest, the Squires, in the 18th century, began to have misgivings that their claims in this respect had perhaps been pushed too far. By a statute of 1770 they tacitly surrendered the privilege in favour of members' personal servants. Officers of the House—of each House—are privileged, like members themselves, when engaged in the service of the House, but not the personal servants of the members. It had been previously curtailed by statutes in other ways. But most of the existing limitations upon the extent of this privilege arise from standing orders of the House themselves. In 1626, the Lords had agreed to a resolution disclaiming privilege for treason felony, or refusal to give surety of the peace, and the Commons in 1675 agreed to a similar resolution, and in 1697 agreed to a further resolution disclaiming it in cases of breaches of the peace, forcible entries or forcible detainers. In 1763 both Houses agreed that the privilege did not extend to the case of writing and publishing seditious libels. A member of a House may be committed for an offence under the Bankruptcy Act, 1883, in spite of the privilege of Parliament, *Armstrong, Ex parte Lindsay* (a), and may also be committed for a criminal or quasi-criminal contempt of court, *Wellesley v. Beaufort* (b). In any case in which a member of either House has been arrested upon a criminal charge and also in the event of

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(a) (1892) I. Q. B. 327.

(b) 2 Russ. and M. 639 (1831)

condemnation the House of which he is a member is duly apprised of the fact. A standing order of the House of Lords of 1902 directs that no Peer or Lord of Parliament has privilege against obedience to a writ of *habeas corpus* directed to him (a). The duration during which this privilege lasts in the case of Peers is according to a standing order of the House of Lords "within the usual times of privilege of Parliament," an expression which is taken to mean, a period which begins forty days before the return of the writ of summons in the beginning of every Parliament and continues forty days before and after every session of Parliament for members, and twenty days in each case for their servants. In the case of the Commons, it has been held that a member cannot be arrested for a period of forty days before and after the meeting of Parliament (*Goudy v. Duncombe*) (b); and also that he is immune from arrest for a period of 40 days even after the dissolution of the Parliament of which he was a member. A member who is in custody at the time of his election is liberated upon his election, in virtue of his privilege, unless he is undergoing a term of imprisonment for an indictable offence or for a criminal contempt of court (c).

Duration of  
the privilege.

13. The right to (iii) punish what the House regards as a breach of privilege by summary commitment for contempt stands in law to-day where it was left by the cases previously noticed. But since the Squires have ceased to have a predominant voice in its counsel the spirit of its enforcement appears to have altered, and Maitland bears testimony that "on the whole the power has of late been exercised temperately enough, save in some moment of irritation" (d).

(iii)  
Privilege of  
commitment  
for breach of  
privilege.

14. Incidental to these privileges are two others which have been described (e) as (iv) the right of each House to provide for its due composition and (v) the right to regulate its own proceedings. Under the former, the House of Commons, through its Speaker, issues new writs on vacancies, determines questions as to the legal qualifications of its

Other privi-  
leges.  
(iv)  
Right of each  
House to pro-  
vide for its  
due compo-  
sition.

(a) Halsbury, Laws of England, Vol. XXI p. 780, Note (a),

(b) 1 Exch. 430 (1847).

(c) Halsbury, Laws of England, Vol. XXI p. 779, Note (x).

(d) The Constitutional History of England, 1913, p. 378.

(e) Ridge's Constitutional Law, 1905, pp. 65-72 and 80-81.

members and expels members not legally disqualified for what it considers good cause. Questions of disputed election fell within the same category until 1868, when by a supreme act of self-denial the Houses handed over this jurisdiction to the law courts (a). Parallel to these rights of the Commons is the right of the Lords to decide on the validity of new creations of Peers.

(v)  
Right to  
regulate its  
own proceed-  
ings.

15. The right to regulate its own proceedings which is equally enjoyed by both Houses was vindicated as recently as 1884 in *Bradlaugh v. Gosset* (b). The plaintiff who had been duly elected a member asked the court to declare that a resolution of the Commons excluding him from the House, which had prevented his taking the oath required by the Parliamentary Oaths Act of 1866, void, and to restrain the Sergeant-at-Arms from carrying it into effect. The court held that the House of Commons had the exclusive power of interpreting the statute so far as the regulation of its own proceedings within its own walls was concerned and that even if that interpretation should be erroneous the court had no power to interfere with it directly or indirectly. The court in this matter might obviously have held otherwise, but preferred (as it has always done when brought to face its new masters the honourable members of Parliament) to be discreet rather than valorous.

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(a) On the announcement of the decision of the House of Lords in *Ashby v. White*, 1 Smith L. C. 240 (1704), holding that an action lay against a returning officer for refusing the vote of a duly qualified person, the Commons after 9 days' debate passed resolutions that neither the qualification of an elector, nor the right of any person elected was cognisable or determinable elsewhere than before the Commons of England in Parliament assembled except as specially provided for by Act of Parliament, and that an action in any other court was a breach of privilege. The Lords passed counter-resolutions. The Commons then proceeded to give effect to their views by committing to prison certain other men who had brought actions against returning officers similar to Ashby's, together with their counsel and solicitors who attempted unsuccessfully to obtain their discharge on *habeas corpus*, the majority of the judges (*contra* Holt, C. J.,) holding that the House of Commons was the sole judge of its privileges. The burgesses having applied for a writ of error to the Lords, there arose the likelihood of a serious dispute between the two Houses, which the Queen prevented by proroguing Parliament. That set the burgesses and their legal advisors at liberty to pursue their legal remedies without intervention of privilege and they obtained verdicts and execution against the returning officer. See Thomas, *Leading Cases in Constitutional Law*, pp. 34-36.

(b) 12 Q. B. D. 271 (1884),

16. Of the other privileges of the Parliament of the United Kingdom I need mention only two ; (vi) exemption from service on juries and (vii) power to withhold permission to publish proceedings and to exclude strangers from the precincts of the House. This last mentioned power was necessary for its safety when it had to go in fear of Kings and Nobles. Parliament has no occasion now to conduct its proceedings within closed doors but the power exists for use upon emergencies. Each House still regards reports from any one of its committees as being strictly privileged and will punish any person who publishes or causes to be published any such report before it has been presented to the House. Since 1835, by setting apart a gallery of the House for the use of the Press, it has tacitly permitted the presence of unofficial reporters at its debates, and neither House considers a report of its proceedings in a newspaper or other publications to be a breach of its privilege unless such report is manifestly inaccurate and untrue (a). The courts too have held that the proprietor of a newspaper is not liable for publishing a faithful report of a debate in Parliament in his newspaper, *Wason v. Walter* (b).

(vi)  
Exemption  
from service  
on juries.  
(vii)  
Power to  
withhold  
publication of  
proceedings.

17. Thus it appears that the Mother of Parliaments came by its privileges after much struggle, many reverses and more usurpations and blunders. The law of Parliamentary privilege of England, like her law of treason, still remains a historic growth not yet subjected to scientific examination and rearrangement, and its condition naturally at this moment is far from satisfactory. "Assertions of privilege," says Sir Erskine May (c), "are made in Parliament and denied in the courts. The officers who execute the orders of Parliament are liable to vexatious actions and, if verdicts be obtained against them, the damages and costs are paid by the Treasury. The parties who bring such actions instead of being prevented from proceeding with them by some legal process acknowledged by the courts can only be covered by an unpopular exercise of privilege which does not stay the action". But anomalous as the law is, it contains elements of permanent value and other

Present state  
of the law in  
England.

(a) Halsbury, *Laws of England*, Vol. XXI, pp. 780-784.

(b) *L. R. 4 Q. B. 73*, 89 (1868).

(c) *Parliamentary Practice*, 12th Edn., p. 138.

nations have not failed to make the most of them. They have tried in their own way to separate the grain from the chaff, and, sensibly enough, no attempt has been made to apply the English law of Parliamentary privilege, in its entirety to colonial legislatures.

Parliamentary privilege  
in British  
colonies.

18. To take up the case of colonial legislatures first, without express grant, a colonial legislature, it has been held, possesses no power to protect itself against obstruction or disturbance of the proceedings by misconduct of any of its members in the course of those proceedings, except such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute. But whatever, in a reasonable sense, is necessary for those purposes is impliedly granted whenever any such legislative body is established by competent authority. For these purposes protective and self-defensive powers only, and not punitive, are necessary (a). They thus possess the power of expelling disorderly persons, it being inherent in the right to preserve order which every person who administers a public duty has, in the place where it is administered (b). But, in the absence of express grant, they have no power to punish by imprisonment contempts committed either in their presence or outside (c). Power, however to adopt as their own the privileges, powers and immunities of the House of Commons of the United Kingdom has been expressly granted to the Dominion and the Provinces of Canada, to the Commonwealth of Australia, and to Victoria, Western Australia and South Australia, to the Transvaal, the Orange River Colony, and Natal ; and indeed to every colony whose legislature comprises a legislative body of which one half is elected by the inhabitants of the colony (d). A standing order of the Legislative Assembly of New South Wales empowering the House to suspend from its service a member charged with an offence until verdict or

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(a) *Barton v. Taylor*, 11 App. Cas. 197, 203 (1886).

(b) Per Lord Abinger C. J. in *Jewison v. Dyson*, 9 M. and W. 540 at p. 586 (1842).

(c) *Doyle v. Falconer*, L. R. P. C. 328 (1886) ; *Fenton v. Hampton*, 11 Moore P. C. C. 347 (1858), *Kielley v. Carson*, 4 Moore P. C. C. 63 (1842).

(d) Mr Tarring's Article on Dependencies and Colonies in Halsbury's Laws of England, Vol. X, pp. 536-537, *Fielding v. Thomas*, (1896) A. C. 600 P. C. at p. 610,

further order has been held to be within the power, conferred by the Constitution Act, 1902, to prepare and adopt standing rules and orders regulating the orderly conduct of the Assembly, the House being the sole judge of the occasion requiring its enforcement and a court of law being incompetent to question its validity so long as it relates to orderly conduct in the House (a). But a standing order of a Legislative Assembly adopting the rules, forms and usages of the Imperial Parliament signifies only those then existing, and cannot be taken to adopt by anticipation all future changes in the practice and procedure of the British House of Commons (b).

19. The principles enunciated above would govern Indian legislatures upon whom no privileges of any kind have been expressly conferred by statute, if such powers as they might otherwise have were not in fact expressly restricted by statute and rules framed by other authorities under powers conferred on them by statute. Under sec. 63 of the Government of India Act of 1915, the Governor General in (his Executive) Council is given power with the approval of the Secretary of State for India in Council to make rules *inter alia* as to the number of elected and nominated members, the number of such members to constitute a quorum, the term of office of such members and the manner of filling casual vacancies occurring by reason of absence from India, inability to attend to duty, death, acceptance of office or resignation duly accepted or otherwise, as to the condition under which and manner in which residents in India may be nominated or elected as additional members of the Indian Legislative Council, and as to the qualification for being or being nominated or elected an additional member of that Council, ; and these rules are not subject to repeal or alteration by the Governor General in Legislative Council. The Governor General in (his Executive) Council has similar power to frame rules for regulating the composition of the Local legislatures subject to the restriction contained in cl. (2) of sec. 74 of the Government of India Act that at least one half of the nominated and elected members must be persons not in the civil or military

Parliamentary privilege in India does not exist.

Legislative Councils have no control over their own composition and proceedings.

(a) *Hurnett v. Crick* (1908) A. C. 470 P. C.

(b) *Barton v. Taylor*, 11 App. Cas. 197, 202 (1886) and *Tarring on Dependencies and Colonies* in *Halsbury's Laws of England*, Vol. X, p. 537.

service of the Crown in India. Under the regulations, power is reserved in the Executive Government to declare finally whether a member has been properly elected or not or whether a nominated or elected member has ceased to be such by reason of supervening disabilities of the character specified in the rules. The decision of questions of disputed elections is also left in the hands of the Executive and it is further provided that the decision of the executive Government on any question that may arise as to the intention, construction or application of the regulations is final. The Indian legislatures have rather larger powers with regard to conduct of legislative business (including rules prescribing the mode of promulgation and authentication of Acts passed by them), since under sec. 70 of the Act, the Governor General in Legislative Council, with the assent of the Governor General and subject to disallowance by the Secretary of State in Council, and under sec. 83 of the Act, the Local legislatures with the assent of the Governor, Lieutenant Governor or Chief Commissioner, and subject to disallowance by the Governor General in Council, may alter the rules of business of their respective Councils.

But limited  
control over  
rules of busi-  
ness.

20. How far do members of legislative assemblies in India enjoy the Parliamentary privileges of freedom of speech and debate and freedom from arrest and molestation? As both these privileges are considered to be parts of the ancient law and custom of Parliament, it follows from what has been said before that these cannot in the absence of express grant of such privileges by Parliamentary legislation be claimed by the Indian legislatures. It follows therefore that members of these legislatures as such have no more freedom of speech and debate than any private individual in India. "Of course", as Mr. Mayne points out, "if a charge of defamation is made against a member, the case would come under Exc. 9 to sec 499 of the Penal Code, and the presumption in favour of good faith would be overwhelming (a). A similar presumption would without doubt also arise in a civil action for libel. There would, further, it seems, be a *prima facie* presumption of good faith when a member is charged with making seditious speeches in Council, specially as it may be assumed that a member proceed-

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(a) Mayne, Criminal Law of India, 2nd Edn., p. 891.

ing to make such a speech would ordinarily be instantly ruled out of order,

21. As to immunity from arrest and molestation, the members of Indian legislatures clearly do not possess any, and as to the power of committing for contempt, not having any privileges, they naturally have no use for a remedy, summary or otherwise, to enforce them. On the whole, it does not appear to me that members of the Legislative Councils in India have any distinctive legal character of any kind (a).

Members of Legislative Councils in India have no legal character.

22. The constitutions of all European countries (except Russia) of Japan, the United States, and the four most important Latin American Republics at least (e.g. the Argentine Republic, Chile, Brazil and Mexico), all of which have been framed during the last hundred and fifty years, make provisions concerning the privileges and immunities of their legislators. The *dissecta membra* thrown off by English constitutional history have furnished the materials out of which these have been built. And yet the unanimity they exhibit on most points is so marked that a strong presumption certainly arises that they embody on the whole the most essential elements of the English law of Parliamentary privilege.

Parliamentary privilege in other countries borrowed from England. Points of agreement between the laws of different countries.

23. First, then, as to freedom of speech and debate, all of them except the Swedish and Danish constitutions confer absolute immunity outside the House in respect of members' speeches and votes within it. The Swedish constitution requires a special resolution concurred in by five-sixths of the House to authorise the prosecution or arrest of a member for action or utterance in the House, whilst the Danish constitution appears to give this right to a bare majority of the House.

(i) Freedom of speech and debate.

24. Secondly, as to arrest, the constitutions (except those of Russia, Mexico, Italy, Switzerland and Holland) expressly provide that no member shall be arrested during session, unless taken in *flagranti delicto*, without previous autho-

(ii) Freedom from arrest and prosecution.

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(a) Should the proposals for Indian constitutional reform recently submitted by Mr. Montague and Lord Chelmsford to Parliament be adopted and the Indian legislatures in the Provinces made in any degree autonomous, it is not difficult to foretell that members of those legislatures will secure some at least of the immunities and privileges enjoyed by members of the British Parliament and similar privileges must also be conferred on the members of the Council of the Governor General.



risation of the House of which he is a member. Upon arrest during session for such an act and also where the arrest has taken place during recess, the House according to most of them has authority to order his release and stay of further proceeding in courts till the end of the session or until the signification of the House's pleasure. Under most of these constitutions, the House may not only secure the liberty of a member when arrested, but may even suspend all judicial proceeding against him during the session, and prosecution of the offending member may proceed in such cases only with its sanction (a). In Sweden only is the arrest of a member, if the offence is serious, made to depend not on the consent of the House, but on the result of a preliminary investigation by the judge before whom the complaint has been lodged. In Italy and Switzerland, the matter is presumably left to be regulated by constitutional custom, whilst, as regards Japan, the latest recruit into the rank of constitutional governments, the constitution (Art. 53) does not seem to give the House power to interfere with the ordinary course of judicial proceedings in the interest of a member, and amongst offences for which he may be arrested without the consent of the Legislative Assembly are included those connected with a state of internal commotion or with foreign trouble. The Russian constitution of 1906 (now defunct) contained no immunities in favour of members of the legislature, presumably because, as in the case of members of Legislative Councils in India, it was not intended that they should have any. The constitutions of Holland and Spain provide for trial of members of their legislative bodies on criminal charges before the Supreme Court, at the instance, in the former country, of either the Crown or the Lower House. The fact that members of the States General in Holland can be tried, if at all, only before the Supreme Court, does no doubt to a certain extent counterbalance the disadvantages that may arise from the absence of the immunity from arrest and prosecution which figures in most of the constitutions including even that of Spain, which like that of Holland makes the members triable only by the Supreme Court. Mexico would have her senators and deputies impeached before the Senate for official crimes

Member of legislature triable only before the Supreme Court in Holland and Spain.

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(a) The Argentine Constitution requires for such sanction a two-thirds majority vote of the House of which the accused is a member (Art 62).

and tried in ordinary courts for ordinary crimes, in either case with the sanction of the House of Deputies. Members of the Storting are liable to impeachment under the recent constitution of Norway (a).

Liability to impeachment for official crimes in Mexico.

25. Under art. I, sec. 6 of the Federal constitution of the United States of America, the Senators and Representatives are in all cases, except for treason, felony and breach of the peace, privileged from arrest during their attendance at the session of their respective Houses and in going to or returning from the same ; and for any speech or debate in either House they cannot be questioned in any other place. For wrongs, therefore, other than those arising out of words spoken in the House, members of the United States legislature are triable before ordinary courts in the same way as private citizens, free, however, from any liability to arrest during their attendance at the session of their respective Houses and in going to and returning from the same. As sec. 4 of art II of the constitution (which provides for the removal from office, upon impeachment for and conviction of treason, bribery or other high crimes and misdemeanours, of the President, Vice-President and all civil officers of the United States) has been construed as not applying to Senators and Representatives, it follows that in the United States of America, Senators and Representatives do not enjoy the doubtful privilege, which their congeners in some cases possess under the Mexican constitution, of trial by the method of impeachment.

Parliamentary privilege in the United States.

Members not liable to impeachment as in Mexico.

26. Unlike the House of Commons in England, neither House of the Congress has yet seen fit to surrender its power to determine questions of disputed election, qualification and return of its own members, to the law courts, and each House claims authority to refuse to admit a member for other reasons than those prescribed in the constitution, as for example, for conviction of a crime or suffering from a dangerous contagious disease. Contested elections are tried by Committees on Privileges and Elections. Once admitted to his seat, a member can be deprived of it only by expulsion

Power of Congress to determine its composition.

Expulsion of members.

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(a) For the provisions just discussed, see Dodd's *Modern Constitutions*, and as to the Turkish Constitution, the Article on the "The New Turkish Constitution" in the *Journal of the Society of Comparative Legislation*, N.S., No. XX, pp 328-336.

which, under the constitution, can only happen with the concurrence of two-thirds of the members of the House (a).

No legal liability for non-feasance and malfeasance in office.

27. I shall close the present discussion with pointing finally to the fact that in the very nature of the thing a legislator cannot be accountable to any authority outside the House to which he belongs for the due discharge of his official functions. The independence of legislators is of as great importance, in the public interest, as that of judges and jurors and the same reasons exist in their case for immunity for non-feasance and malfeasance in office as in the case of judges of superior courts and juries, and this appears to be well recognised in the laws of England and of the United States, according to which a legislator is liable neither to ordinary criminal process nor to impeachment in respect of his official doings however corrupt (b), and still less to civil action for damages. The principle is also found embodied in most of the written constitutions of Europe and America in terms which expressly confer on legislators immunity in respect of votes given in the House (c).

## LECTURE XVI, OF JUDICIAL OFFICERS.

Distinction between function and status.

1. We have seen that members of legislative bodies in all self-governing countries have rights, privileges and immunities which mark them off as possessing a legal status peculiarly their own. These rights and privileges form no part of the functions which they are called upon to discharge, but they are powers and privileges with which they must be endowed in order that they may perform those functions in a satisfactory manner. In the case of judicial officers, also, we shall observe the same distinction between the functions they are authorised to discharge and the armour of rights and privileges by which they are encompassed in order to enable them to perform the duties of their office efficiently. It is these rights and privileges and matters bearing thereon that

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(a) Garner, *Government in the United States*, pp. 187-188.

(b) Bishop, *New Commentaries on the Criminal Law*, 1892, Vol. I, p. 279.

(c) See Dodd's *Modern Constitutions*.

have to be examined in order to define the status of holders of judicial offices.

2. At the foundation of all administration according to law lies the independence of the judiciary, and all governments which make any claim to it must provide guarantees that their judges should deal out justice not only as between subject and subject, but also as between Government and its agents on the one hand and subjects on the other, without fear and favour. It is because the independence of the judiciary is so indispensable a condition of the rule of law that the power to organise the law courts and the control over their *personnel* assume such paramount importance in all modern constitutional arrangements.

Independence of the judiciary as a condition of the rule of law.

3. Like the independence of legislators, that of judges, in the form that we know it, was evolved in the English constitution.

Origin in England.

4. In the later Roman Empire, justice was administered in public and had not to be paid for, there was fairly complete equality of all before the law, liberty of defence, trial face to face with the accused, a good system of proof and finally a right of appeal. But this justice was dispensed by administrative officials, and the Emperor had the prerogative of bringing before his tribunal all cases or of submitting them to commissioners or special judges (a). His control over the courts and the judges was thus unlimited. The executive in England to-day have no power to organise the courts, and control over the *personnel* of the courts has virtually passed out of their hands.

Its absence in the Roman Empire.

5. The English judicial system is by no means a mere improved version of the Roman. It is an indigenous growth, made possible only by the peculiar circumstances of the country which have helped to make its higher judiciary what it never came to be in any other system—a power in the land. Some of these circumstances and the manner in which the judiciary in England developed as a separate organ of the State, co-ordinate with the legislature and the executive have been traced in outline in a previous lecture (b).

English judiciary radically different from the Roman.

(a) Brissaud, *History of French Public Law*, pp. 33-34,

(b) See Lecture III (VIII) *supra*. Also Lecture V *supra*.

Judicial system in Monarchical France.

6. Were it possible for the judicial system of Imperial Rome to develop imperceptibly into a system of courts independent of and co-ordinate with the other organs of the State, the transmutation would assuredly have taken place in one of the several post-Feudal monarchies of Western Europe which were more influenced by Roman ideas of administration than the English. But the breach effected by Feudalism in the continuity of European history was so complete that the experiment never had a chance. And yet justice as it was administered in Western Europe during this interlude between the predominance of Roman and English ideas over the administrative systems of Europe was not without a character of its own. In the 16th century, the triumph of monarchy over the forces of Feudalism found expression in the judicial administration of France in the principle that all justice emanated from the King. Everywhere except in the courts of the Church, justice was rendered in the name of the King by virtue of an express or tacit delegation of authority—a principle which gave theoretical justification to the King's interference with the surviving Feudal courts in cases of abuse (a). But already before this period, the King had lost control over the *personnel* of his own courts owing to the feudalisation of all offices including those of judges. The recruitment of the "Parlements" of right belonged to the King, but after the 14th century it was by no means rare to see the incumbent of a public office (following the example of holders of ecclesiastical benefices) disposing of it for the benefit of a third party by the indirect method of resignation in his favour. The needs of the Treasury led to the legalisation of this practice, and Francis I, it is said, ran an open shop, first for the sale of financial and then of the judicial offices themselves. After him and until the end of the "Ancien regime", no budgetary expedient was indeed more frequently resorted to than the

Feudalisation of judicial offices which became saleable.

(a) Brissaud, *History of French Public Law*, p. 427. This operation commenced and was completed earlier in England. But "the change was not the product of the genius of any particular race for freedom or for law-abidingness. It had nothing whatever to do with the angelic nature of Henry II, or the lion-hearted absence of Richard I, or the diabolical wickedness of John. It came at some time over all the Western States which were touched by the sceptre of Rome". Jevons, *Tort, Crime and Police in Medieval Britain* (1917), p. 97.

creation of new offices. Obviously, says Brissaud, they had to recognise the right of the purchaser to resell the office he had bought in order to obtain a higher price for it, and as the Treasury did not wish to lose any opportunity for gain, the right was granted only upon the payment of a fee into the Exchequer. Nevertheless until 1597 an oath continued to be demanded from every incumbent of a judicial office that he had not bought his office directly or indirectly ! The law also required that he should possess certain conditions of capacity (*e. g.* as to age, title and the passing of an examination which last was reduced to a mere formality) (a).

7. But strange as all this may seem to modern ideas, the system had its brighter aspects. He who bought his office could not fairly be deprived of it without serious cause established by a judicial process (b). The principle of irremovability was affirmed in several Royal Acts between 1344 and 1467. But in reality it existed and was fully recognised as a consequence of the practice of sale of offices. The independence of the magistracy," says Brissaud truly, "was born of an abuse" (c).

Resulting independence of judges.

8. Other less desirable consequences were the heritability of the judicial offices and the revival of the old practice of judicial fees. The system undoubtedly gave preference to wealth instead of to merit. But the irremovable tenure did minimise these and other evils. "The magistracy", says the same writer, "was distinguished for its integrity, its industry, its learning". Who, after this, will say that the judicial system of post-Feudal France has no lessons to teach to modern administrators ?

Heritability of office and judicial fees, other less desirable consequences.

9. The value of that lesson was brought home in a remarkable manner by the events of the French Revolution. The monarchical maxim, "all justice emanates from the King," became "all justice emanates from the Nation." Justice having a single source, a single class of tribunals, the District Courts, was organised in which justice was rendered in the name of the State. The English system of trial by jury was introduced by the Constituent Assembly in criminal

Judicial system of the Revolution.

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(a) Brissaud, History of French Public Law, pp. 458 459.

(b) This, as will be observed later, is the permanent contribution of the system to judicial administration on the Continent of Europe.

(c) History of French Public Law, p. 459.

Elective  
judges.

trials as a form of popular justice. Below the District Courts were the Justices of the Peace who sat in judgment upon the cases of the poor, and above all was a Court of Review charged with ensuring a uniform interpretation of the law throughout the State. All this appears to be quite unexceptionable. But the Constituent Assembly was convinced that the judicial power being one of the manifestations of the National sovereignty, it could be exercised only by those who had been elected to the office by the people, though the Assembly was sensible enough to provide that no one could be elected a judge unless he had attained the 23rd year of age and had practised for five years in the profession of a lawyer. But the more democratic Convention made all citizens who were twenty five years of age eligible without other qualification, thus opening the magistracy to politicians.

Judges made  
appointive  
and irremoveable by  
the Constitution of  
1800.

10 By making the judges elective, the Revolution abolished the principle of irremoveability for the magistracy. By 1800, the nation was convinced that neither the election nor the removeability of the judges made for efficiency or honesty in judicial administration and no objection was raised when the Constitution of the year VIII made the judicial office appointive and irremoveable, and that is what it has remained since 1800 (a).

Judicial system of England—its main features.

11. Turning now to the judicial system of England of the present day, the main features thereof are :- (i) That the executive no longer controls the organisation of the law courts ; (ii) that the higher judiciary controls and supervises the judicial work of the lower ; and although all appointments to judicial offices rest with the executive, the power of removing judges of the higher courts has been taken away from it, and the tenure of judges of all grades is practically independent ; (iii) that no trial of any political importance can take place without participation in it by a lay element, viz : the jury, with whom indeed rests the final decision in all criminal trials ; (iv) immunity of judge and jury for delivering wrong judgments or erroneous verdicts ; (v) power of self-protection possessed by the higher judiciary, at least, by committal for

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(a) Brissaud, *History of French Public Law*, pp. 558-562. Mignet, *History of the French Revolution*, Ch. III (Bohn), p. 96.

contempt ; (vi) special protection afforded to judges by the criminal law.

12. *First*, as to the power of organising courts of law :— If the practice of the last two hundred years only be looked into, Parliament would appear to be the only authority which creates new courts of law and the prerogative power of the Crown in that behalf should be taken to have fallen into desuetude. But one of the principles of English constitutional law which English lawyers habitually affirm is that no prerogative ceases to exist simply because it is not used, and if it has to be taken away or restricted it must be by statute, expressly or by necessary implication. Accordingly one finds it solemnly recorded as the latest statement of the law on the subject that “courts are created by the authority of the King as the fountain of justice.” This authority is exercised either by statute, charter, letters patent, or order in council. In some cases a court is held by prescription, as having existed from time immemorial, with the implication that there was at some time a grant of the court by the King, which has been lost.” “An Act of Parliament,” the statement proceeds, “is necessary to create a court which does not proceed according to common law. The King, however, may grant a court with jurisdiction to hear and determine actions according to the common law either limited or unlimited. The King may also grant the franchise of cognisance of pleas, by which the grantee obtains cognisance of all pleas within the limits of the grant which are commenced in other courts than that of the grantee. The King may also grant an exempt jurisdiction, whereby the inhabitants of a city or borough may not be sued except within the city or borough.” The proposition that an Act of Parliament is necessary to create a court the procedure of which is not according to common law is said to be subject to the qualification that it does not apply to a Crown colony properly so called, that is, a colony which has not received a representative government (a).

(i) Power to establish and organise law courts now belongs to Parliament.

Power to establish courts by prerogative in the colonies.

\* 13. I apprehend that the power of creating law courts by prerogative would have been treated by the last writer as

(a) Halsbury, *Laws of England*, Vol. IX, pp. 17-18. See as to Franchise Courts in Medieval England, Jendwine's *Tort, Crime and Police in Medieval Britain*, Chs. XII, XIII.



dead, if it had not come useful during the last two centuries in the administration of the colonies. In the first part of the 18th century, courts appear to have been established in the British factories in India by virtue of Royal prerogative, and, as regards colonies, the late Professor Maitland, speaking in 1887, was not sure that the power had not been exercised for them in much more recent times. As to even this, however, in 1827, the law officers of the Crown advised that the extent of the power to create a new court in Canada was very doubtful and it would be wiser to obtain an Act of Parliament. So far as regards England, the prerogative power has not been used for a long time past and in recent years the whole country has been covered by a net-work of new local courts, the County Courts, by statute (9 and 10 Vict. c. 95). There are, says Maitland, two reasons why this prerogative has fallen into disuse. (i) Since it is admitted that the Crown cannot create a new court of equity, a court created by prerogative which would only administer the common law would be a somewhat useless and a very clumsy institution. (ii) Owing to the appropriation of supplies being in the hands of Parliament, there would be no money to pay the expenses (a). Looking at the matter from outside, it seems to me that it would be much better if it was frankly recognised that the authority to create courts by prerogative is dead so far as England is concerned; and that even as regards the colonies it is not likely to be exercised in the future.

(ii) Independence of tenure of judges and magistrates.

14. *Secondly*, as to the independence of tenure of English judges and magistrates: There are several elements which go to constitute it at the present moment, not all of them rules of law. Though judges of the Supreme Court only hold office during good behaviour, and may not (since 1701) be dismissed from office otherwise than upon a joint address of the two Houses of Parliament or upon conviction at an impeachment trial, and all other judges and magistrates, including (curiously enough) the head of the judicial system, the Lord Chancellor, like all officers under the Crown, hold office *durante bene placito*, owing to the English habit of regarding every right presently enjoyed by any person as a vested interest of which the holder may not be lightly deprived,

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(a) Maitland, Constitutional History of England, pp. 419-420.

all inferior judgeships and magistracies have come to be viewed as life offices terminable only for cause, the office of the Lord Chancellor, a political office, being the only judicial office the incumbent of which is removed at the Crown's pleasure. The system of "spoils" and "rotation" which one sees in the United States and in some countries on the Continent of Europe has no place in England even in the disposal of executive, far less of judicial appointments, though no doubt when vacancies occur, appointments made by the political party then in ascendancy do naturally bear its particular political complexion. But even if the tenure of the inferior judiciary, being *durante bene placito*, be regarded as uncertain, the hierarchic organisation of the judiciary in England, under which errors, excesses and derelictions of duty on the part of inferior judges and magistrates are subject to examination and correction by a judiciary possessing an irremovable tenure must go far towards nullifying extrinsic interference with the proceeding of the lower judiciary. This hierarchic organisation, I mention in passing, is said to have followed from the principle: "All justice emanates from the King." It is, however, not so much the principle (which was equally recognised in France but did not produce the same consequences), as the successful manner in which it was worked out in practice that has made this organisation really effective in England.

15. There are certain other elements which are usually not taken into account in dealing with this topic of the independence of the English judiciary, but which must not be overlooked in any comparative treatment of it. The liberal salaries paid to the higher judiciary need only be lightly touched upon, since the amount is really far in excess of what is absolutely necessary to remove from the incumbents all temptations to resort to corrupt practices. The amount is really determined by the manner in which these judges are traditionally recruited. Only leaders of the bar who command the confidence of the profession can without clamour be raised to the Benches of the Superior Courts, and the amount of remuneration offered to them have in consequence to be sufficiently attractive to induce them to abandon a practice which ordinarily brings them pecuniary returns far in excess even of the high salaries which the Government has attached to those offices. But to men so recruited, money alone is

Life tenure in judicial offices in fact though not in theory as to lower judiciary.

Hierarchic organisation of courts, as a security against executive interference.

Salary of judges.

no inducement to departures from honest conduct. Many such do indeed sit and work on the Judicial Committees of the House of Lords and the Privy Council without remuneration.

Conclusive value attached to judicial pronouncements. Its effect.

16. But that which raises the higher judiciary in England (and in fact in all Anglo-Saxon countries) to the position of a co-ordinate organ of the State equal in weight and influence with the executive and the legislature is the conclusive value attached to its pronouncements by every authority in the State. In Continental Europe, including even Belgium (as I have previously pointed out), constitutional provisions make the legislature itself the sole authority to interpret its statutes, and the decisions of even the highest courts have not the binding authority of precedents. But in England, though no court has power to, and will, pronounce a statute of Parliament unconstitutional and void, a decision of the House of Lords or of the Judicial Committee of the Privy Council, whatever interpretation it may choose to place upon a statute or any other rule of law, will be loyally accepted by all authorities as binding until it should be repealed or modified by Act of Parliament. (a)

(iii) Trial by jury.

17. *Thirdly*, as to trial by jury : Whether this institution was in its inception indigenous in England or was imported from the Continent is of no consequence to us at the present day, for the institution, as we know it now, is as thoroughly English as the Parliament itself. As law becomes, as it must in all progressive communities, more and more complicated and technical, there is a natural tendency for administration of justice to fall into the hands of professional lawyers. But neither in Greece, nor in Republican Rome was the lay element altogether eliminated. In Feudal society, people habitually looked to be judged by their peers and trial of disputes by professional judges was a Royal innovation. Accustomed, as we have come to be in India, to a highly technical scheme of laws and to having our disputes settled by experts thoughtfully provided us by the same authorities who have given us our laws, we are apt to forget that in ordinary circumstances, it is justice dispensed not by experts but by men who would

The lay element in judicial administration—Its value.

(a) For the best explanation of this difference in the relations of the judiciary and the legislature in English-speaking and Continental countries, see Mellwain's *High Court of Parliament and Its Supremacy*, Ch. IV.

act and feel as the parties themselves which proves most satisfying to the unsophisticated. But as law in any but the most primitively organised societies is bound to be technical and complex, the expert early becomes an indispensable factor in the administration of law. But both in the later Roman Empire and in Monarchical France, the necessity of expert adjudication received such disproportionate emphasis as to eliminate the lay element altogether. It remained for England to devise a scheme in which each element was to have its proper place. As has been pointed out in a previous lecture, this combination of expert and lay elements in which, be it noted, the lay element has on the whole the determining voice, is not an isolated feature of English judicial administration. It is but the manifestation in one department of political life of a spirit which animates and works the entire system (a). In spite, therefore, of the severe strictures to which trial by juries is periodically subjected by impatient experts, there is, I believe, small likelihood of its being discarded unless there is first a complete reversal in the political habits and ideas of the English people.

How eliminated in Rome and Monarchic France.

Combination of lay and expert elements in judicial administration in England.

Why not likely to be abolished in England.

18. The merits of trial by jury undoubtedly far outweigh its defects, and, national habit apart, it will hold its ground in the English system of judicial administration on account of its inherent superiority over trial by merely professional judges. The pedantries of much of Medieval judge-made law, its excessive refinements, and what may be called its high ritualism, would have proved intolerable to even the most deferential of people, if these had not been in a large measure neutralised and restrained in their application, in the majority of cases, by the very obtuseness of the hard-headed men who in determining the facts of the case as jurors took just so much of the advice and adjuration from the Bench as they were capable of (b). Expert criticism notwithstanding, an

(a) *Supra*, Lecture X, para 22.

(b) Since the above was written, I have found the following confirmatory passages in an address delivered by Mr. Elihu Root before the Constitutional Convention of New York on July 17, 1894: "I believe that it serves to bring the people—not lawyers and judges but the plain people—into intimate participation in the administration of law. I believe that it mitigates the severe logic of the law and makes its administration tolerable. I am not surprised that we should have expressions from judges which tend in derogation of the

institution which is frankly burgeoise and has long formed the butt of legal witticisms could hardly have come to be regarded as one of the main pillars of civil liberty, had it not on the whole satisfied material requirements more adequately than official justice can ever hope to do.

Not applied  
in petty cases.

19. It is however not necessary for the defence of the system of trial by jury to assert that it must be applied in all cases and that its methods should be the same for all classes of cases. It is undoubtedly cumbrous and dilatory and wholly unsuitable for petty cases. By far the largest number of these cases is now decided by County Court judges and magistrates without jury. In regard to the more important cases, the wisdom of English judges and politicians has worked out certain differences of procedure for trials of civil and criminal cases respectively.

Less suitable  
in civil than  
in criminal  
cases.

20. Trial by jury is obviously less suitable for ordinary civil suits than for criminal cases. The Judicature Act of 1873 accordingly gave power to the judges of the superior courts to do away with it by rules in cases in which experience would prove its unsuitability. Acting in the spirit of this direction, the judges have framed rules which permit the plaintiff or defendant, in cases of slander, libel, false imprisonment, seduction or breach of promise of marriage to insist on a trial by jury (a). It will occur at once to any lawyer that it is precisely in these cases that the sophistries of law have been known to run most decidedly rampant, and, equally decidedly, to need restraining by a considerable measure of common sense.

Except in  
cases of slan-  
der, libel etc.

Difference in  
method in  
civil and cri-  
minal trials.

21. It is in the parts judge and jury are respectively called upon to play in them that trials of civil cases differ from criminal trials. It is broadly stated for both classes of cases that the jury are to determine the facts, but matters of law are for the decision of the judge alone. But if it be given the jury to return a general verdict on the whole case, obviously the jury become the final judges on facts as well as on the law involved in the facts. Now, in civil cases, the judge has the option to

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system of trial by jury, for the system of trial by jury was designed and have served always as a protection against judges." Addresses on Government and Citizenship, pp. 122-123.

(a) Jenks, *Short History of English Law*, p. 378.

do this or to direct a special verdict by putting to the jury certain questions to answer, on which it is for the judge to decide what the legal results of the answers should be (a). But in criminal cases, the jury have in all cases an unquestionable right to determine upon all the circumstances and to find a general verdict of 'guilty' or 'not guilty', though it is no doubt open to them, if they have doubts on matters of law, to return a special verdict setting forth all the circumstances of the case and praying the judgment of the court whether on the facts found the prisoner is guilty or not guilty (b).

Judges have power to take special verdict in civil cases.

Not, except at the jury's option, in criminal cases.

22. I shall, before passing on, touch lightly on the historic controversy which arose and was settled, towards the end of the 18th century, on the question of the right of the jury to return a general verdict in prosecutions for seditious libel. What is or is not sedition is a question upon which the Government for the time being and the people may easily come to hold different opinions, and it is therefore of the highest importance to know whether the people through their representatives on the jury should be allowed to have the last word on a question as to whether a man (who may or may not have had a real grievance) has exceeded the limits of reason in his criticism of the powers that be. In 1688, in the *Seven Bishops'* case (c), the whole case and not merely the publication of the alleged libel by the accused had been left to the jury. During the following century, eminent judges like Holt, Raymond, Lee and Mansfield consistently refused to leave to the jury the question of the criminality of the words used which they argued was a question of construction and therefore of law for decision by the judge alone. The question came to a head in *R. v. Shipley* (d), otherwise known as the *Dean of St. Asaph's* case, in which Erskine argued for the defence that the question of criminal intent was as much a question of fact as that of publication by the accused and that the whole matter ought to be left to the jury. The decision, which

Historic controversy as to the province of the jury in sedition trials.

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(a) Stephen's Commentaries on the Laws of England, 16th Edn., Vol. III, p. 567.

(b) *Ibid.*, Vol IV, p. 361.

(c) 12 St. Tr. 183 (1688).

(d) 21 St. Tr. 847 (1783).

Mr. Dean (a) certifies to have been "absolutely right in law", was against that contention, but no sooner was it passed than Parliament interfered and Fox's Libel Act of 1792 enacted and declared that in a trial for criminal libel, "the jury sworn to try the issue may give a general verdict of "guilty" or "not guilty" upon the whole matter put in issue and shall not be required or directed by the court or judge to find the defendant or defendants guilty merely on proof of the publication by such defendant or defendants of the paper charged to be a libel and of the sense ascribed to the same in such indictment or information". The decision of Lord Mansfield affirming those of his learned predecessors on the Bench might have been better logic though as to even that one may, with Erskine, have one's doubts; but the declaration in Fox's Act upholding Erskine was certainly the better law. It is also better policy, for whilst the judge's charge sets forth the law in all its rigour, the jury who have not to give reasons for their verdict are free to deliver it with due regard to extrajudicial circumstances of extenuation and thus a substantially just decision is reached without stultification of the law.

Adoption of jury system of trial in other countries.

23. If further demonstrations of the value of this institution were demanded, they would be found in the fact that it has been almost universally adopted on the Continent of Europe for the trial of criminal, and in particular, of political, cases.

(iv) Immunity of judges and jurors.

24. *Fourthly*, as to the immunity of judges and jurors: If the judiciary are to dispense justice without fear or favour, they have not only to be made substantially independent of the Executive Government, but must also be placed out of harm's way from disappointed litigants (b). I have in a previous lecture explained why as a rule public officials must in the public interest be *inter alia* (1) subjected to disciplinary control by their administrative superiors and in the last resort of the Government, and (2) made liable to action in courts of justice for violations of the law. But if public interest justifies the rule, it must also justify exceptions to

An exception to the general rule as to legal liability for malfeasance in office.

(a) Student's Legal History, pp. 121-126.

(b) See Halsbury, Laws of England, Vol. XXIII, p. 324. The reason of this rule does not apply in so far as the judge may act ministerially or administratively. See *Ibid*, pp. 325-6. On the other hand it does not require that

that rule in so far as public interests may suffer but for such exceptions. The irremovability of the judiciary is one such exception; the immunity of judges and jurors from action in respect of the manner in which they perform their public functions is another.

25. The immunity of judges, like their irremovability, need not be, and in fact is not, absolute. There are particular species of misconduct for which judges and jurors may be prosecuted and punished as criminals. For instance, a judge, magistrate or other judicial officer who accepts any bribe or reward offered in order to influence him in the conduct of his office is guilty of a misdemeanour in common law (a), and under a statute of the 11th year of Henry IV., all judges and officers of the King convicted of bribery are liable to forfeit treble the bribe, to be punished at the King's will and be discharged from the King's service for ever (b). Moreover oppression and tyrannical partiality of judges, justices and other magistrates in the administration and under the colour of their office, when prosecuted either by impeachment in Parliament or otherwise according to the rank of the offender, is an offence to be severely punished with forfeiture of office, together with fine, imprisonment or other censure, regulated by the nature and aggravation of the offence committed (c).

Immunity  
not absolute.

Liability to  
criminal pro-  
secution of  
judges for  
misconduct  
in office.

26. Apart, however, from judicial misconduct which the law makes punishable as crimes, there may arise the question whether a judicial officer acting as such may lay himself open to criminal prosecution for overstepping his jurisdiction or acting in violation of law in circumstances or from motives which

Criminal  
liability of  
judges for  
acting in ex-  
cess of or  
maliciously  
within juris-  
diction.

the protection should exist only in respect of acts in court *sedente curia*. *Calder v. Halket*, 3 Moo. P. C. C. 28 (1839).

(a) Halsbury, *Laws of England*, Vol. IX, p. 484.

(b) Stephen's *Commentaries on Blackstone*, Vol. IV, p. 217.

(c) *Ibid.*, p. 220. Legislators, judges of the highest courts and all courts of record acting judicially, jurors and probably such high officers of Government as are entrusted with responsible discretionary duties are not, according to Bishop, liable to an ordinary criminal process like an indictment for official doings however corrupt, but judges (not jurors) and other high officers (not legislators) are answerable in impeachment. Bishop's *New Commentaries on Criminal Law*, Vol. I., pp. 279-280. Justices of the peace on the other hand are liable for corrupt conduct to the ordinary criminal process. Justices



In cases of  
judges of  
courts-  
martial.

In cases of  
judicial offi-  
cers proper.

Civil and cri-  
minal immu-  
nity of  
jurors.

in the case of a private person make the act punishable as a crime. If, for instance, a person was executed or otherwise punished under illegal sentence, as may very well happen when sentences have followed the application of martial law in circumstances not justifying its application, the court would have acted wholly without jurisdiction, and in the absence of an Indemnity Act all persons responsible for the execution of such a sentence would seem to be criminally liable. But once it is found that there was justification, the authorities are clear that the sentences even if illegal or oppressive would not make the judge answerable before a court of law, either civilly or criminally (a). But judges of courts martial are not holders of judicial offices, and no case appears yet to have come up for decision where a judge of one of the superior courts of England has been prosecuted criminally in respect of a judicial act. But as regards magistrates, "any fraud or misconduct imputed to them in proceeding, notwithstanding the issue of a *certiorari*, may be a ground for a criminal proceeding against them" (b); and Lord Kenyon said in *R. v. Seton* (c) that he believed there were instances in which criminal information had been granted against magistrates acting in sessions. But these must have been instances of manifest oppression and gross abuse of power, for generally justices are not punishable for what they do in sessions" (d).

27. As to jurors, their immunity from action, whether civil or criminal, for delivering a wrong verdict, appears to have been finally established in *Bushell's* case (u). In that case, the trial judge considering the verdict of the jury who had acquitted Penn and Mead at the Old Bailey Sessions on a charge of preaching in a London street as perverse proceeded to fine several of them and in default had them committed. Bushell, one of the jurors, sued out a writ of *habeas corpus*, on the hearing of which Vaughan C. J. held that a jury could not be

and judges, it seems, are criminally liable for malfeasance or nonfeasance for which no action would lie against them in a civil court. *Ibid.*, pp. 278-80.

(a) 1 Hale P.C. 496-502 and *Reg v. Nelson*, 1 Cock 124, 156 (1867).

(b) 4 Bac. Abr. 631.

(c) 7 T. R. 373 (1797).

(d) Mayne, Criminal Law of India, 2nd Edn, pp. 374-377.

(e) 6 St. Tr. 999 (1670).

punished for not finding according to the evidence and the judge's direction.

28. The leading case on the immunity of judges, *Hammond v. Howell* (a), curiously enough, arose out of the same transaction. Hammond, another juror who had been committed with Bushell, brought an action against the judge, mayor and the whole court of Old Bailey for false imprisonment. Vaughan C. J. and the whole Court of Common Pleas before whom the case was argued came to the conclusion that no action lay against the judge for what he did judicially though erroneously. In *King v. Skinner* (b), Mansfield, C. J., observed that neither party, witness, counsel, judge or jury can be put to answer civilly or criminally for words spoken in office, although if such words amounted to a contempt of Court, they might be punished as such. Subsequent decisions have further developed the principle, and it has been held that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words were not done or spoken in honest exercise of his office (c). But the judge does not seem to be protected, if it is established that in doing what he did, he was acting wholly without jurisdiction. The application of this last rule may be somewhat difficult in the case of judges of superior courts who have a general jurisdiction co-extensive with the kingdom. But as to them as also as to judges with limited jurisdiction the rule admits of exceptions, for it seems to be the law that if the judge was led into assuming jurisdiction by a mistake of fact which he might in the circumstances reasonably make, or if the plaintiff being in a position to place the true state of facts before the defendant failed to do so, the judge acting in the *bona fide* belief that he had jurisdiction would not be liable (d). But

Civil immunity of judges.

(i) For acts within jurisdiction.

(ii) for acts outside jurisdiction.

(a) 2 Mod. 218. (1878)

(b) Loft. 55 (1772).

(c) *Anderson v. Gorrie* (1895) 1 Q.B. 668 (1891); *Fray v. Blackburn*, 3 B. and S. 576. (1863). To this, in the case of a judge of a superior court, refusing a writ of *habeas corpus* in vacation (expressly provided for in the Habeas Corpus Act of 1679) is a statutory exception.

(d) Many objections to jurisdiction, it has to be remembered, involve the decision of a question of fact collateral to the main issue. The general rule is that where the jurisdiction of any tribunal depends upon facts, it has power to determine those facts; but in some cases, the jurisdiction of an inferior

it would be otherwise, if the judge knew or ought to have known the defect of jurisdiction, as for instance where jurisdiction was assumed by a mistake of law (a).

Civil immunity of magistrates and justices of the peace.

29. Magistrates and justices of the peace, however, are not protected to the same extent, subject to special statutory exceptions. They are liable for acts done without jurisdiction, and also for acts done maliciously and without reasonable and probable cause within their jurisdiction (b).

Immunity of judges in Rome more restricted.

The nature of the immunity of judges and magistrates under English law is best exhibited by comparing it with the relatively more restricted immunity enjoyed by judicial officers under Roman law. Under that law, a judge by whose act or default in deciding or conducting a law suit, a party to the suit was injured was liable to an action for damages the amount of which was left to the discretion of the judge before whom this later action was tried. Such action was regarded as quasi-delictual because it was available not only in cases of deliberately unfair decisions but also in cases of less serious errors committed by the judge, as overlooking the day fixed for trial or disregarding the rule of law concerning adjournments and the like (*imprudencia iudices*). In such a case, he was termed "*iudex qui litem suam fecerit*" (who makes the suit his own). The action however could not be taken on the ground that the judgment was unjust in substance (c). These rules of Roman law cannot be said to have been unfair rules, though we have no means of judging how they actually worked in practice. They must have furnished strong incentives to promptitude and care on the part of judicial officers in dealing with the cases and the parties before them.

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court does not arise unless the facts are such as to give it jurisdiction. In the former case, on proceedings by *certiorari*, prohibition, or *habeas corpus*, the rule is that no court can give itself jurisdiction by an erroneous decision upon the collateral point, but for the purpose of deciding whether the judge is protected, the rule *ignoratio facti excusat* applies and the judge having general jurisdiction over such matter is protected unless he had knowledge or means of knowledge of the special fact which ousted his jurisdiction. Halsbury, *Laws of England*, Vol. XXIII, p. 333. As to the various ways in which absence or excess of jurisdiction may give rise to liability, see *Ibid*, pp. 328-329.

(a) *Houlden v. Smith*, 14 Q. B. 841 (1850); *Calder v. Halket*, 3 Moo. P. C. 28 (1839).

(b) 11 and 12 Vict. c. 44.

(c) Sohm, *Institutes of Roman Law*, 3rd Edn., p. 424.

30. The only remedy therefore to which parties are ordinarily relegated under English law in cases of wrongful performance of judicial duties is to be found in an elaborate system of appeals. Further, the irremovability of judges is not, as I have said before, absolute. Judges of the superior courts may be impeached or removed on the address of both the Houses of Parliament. Judges of inferior courts are removable for misbehaviour either by common law or special statute. The Lord Chancellor may remove a County Court judge for inability or misconduct. A justice of the peace is subject to criminal information for misbehaviour and he may also be discharged from the commission at the pleasure of the Crown (a).

Remedies available against judges in England.

31. *Fifthly*, as to the power of commitment for contempt so far as the same may be used by courts for self-protection, this power as exercised by the two Houses of Parliament has been considered in a previous lecture. The power as exercised by the latter appears in fact to have been originally claimed by them in their character of courts of superior jurisdiction (b). The origin of the summary jurisdiction for contempt of Courts of Common Law is said to be obscure, but it is surmised to have been founded upon the contempt implied in disregarding the King's writ (c), whilst the similar jurisdiction of the Court of Chancery is stated to have been exercised in virtue of prerogative delegated to the Chancellor. The contempt punishable as such thus appears to have been in origin contempt of the King—extended later on constructively to contempt of his judges. Only contempts of the King or of the judges of the King's courts were punishable as such, and authority to punish contempts of other courts had to be conferred if at all by statute.

(v) Power of commitment for contempt.

Its origin.

Power inherent in "King's courts" only.

32. "All Courts of Record", said Blackstone, "are the courts of the King in right of his Crown and Royal dignity; and no other court hath authority to fine and imprison for con-

Courts of Record have this power as Royal courts.

(a) Thomas, *Leading Cases in Constitutional Law*, pp 113-4.

(b) See Coke, 5th Inst. 28, *Kielley v. Carson*, 4 M. P. C. 63 (1842); also Mellwain's *High Court of Parliament and Its Supremacy*, pp. 229-235, on this aspect of both Houses of Parliament. The procedure of Private Bill legislation is still judicial, and the function of Parliament was originally understood to be to *find* and not to *make* law.

(c) Halsbury, *Laws of England*, Vol. VII, p. 28, Note (d).

tempt of its authority. So that the very erection of a new jurisdiction with the power of fine and imprisonment for contempt makes it a Court of Record". But in some even of Courts of Record e.g. County Courts, the power is limited by statute to contempts committed *in facie curiae*, that is to say, to wilful insults to the judge, to any juror, to witness, registrar or other officer of court, during his attendance in court or in going to or returning from court and to wilful usurpation of the business of the court and to wilful misbehaviour in court. "Courts not of Record", on the other hand said Blackstone, "are courts of inferior dignity and these are not, as a general rule, entrusted by the law with any power to fine or imprison for contempt. In these", the learned writer goes on to explain, "the proceedings not being enrolled or recorded, as well their existence as the truth of the matter therein contained shall, if disputed, be tried and determined by a jury". No value need be attached to this as to most of Blackstone's explanations. Mr. Edward Jenks' guess that Courts of Record were always Royal Courts whereas Courts not of Record were those which though now regarded as Royal courts (a) were not so originally has, to my mind, every appearance of being the correct one (b).

Nature of  
power of  
commitment.

33. As to the nature of this power, it should be clearly distinguished from the power which every person or body of persons engaged in the performance of a public duty has, to preserve order and decorum in his or its place of business. This mere police power would authorise the official or officials concerned to turn out disorderly persons and where an offence has been committed to hand over the offender to the proper authorities (c). But the power to fine and imprison goes a long way beyond it, specially when the offence has not been committed *in facie*. It is a power which in the expressive phrase of Lord Denman (d) with one voice accuses, condemns and executes.

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(a) This, of course, followed from the application of the doctrine, derived from Roman precedent, that the King was the fountain of all justice in the kingdom.

(b) Stephen's Commentaries on Blackstone, 16th Edn., Vol. III, pp. 502-503.

(c) *Jewison v. Dyson*, 9 M. and W. 540 at p. 586 (1842).

(d) *Stockdale v. Hansard*, 9 A. and E. 1 at p. 156 (1839).

34. "Contempt of court is a misdemeanour at common law and punishable by fine and imprisonment without hard labour. But if the contempt be committed in the face of the court, being a Court of Record, the offender may be instantly apprehended and punished summarily by being both fined and imprisoned at the discretion of the judge, being first given an opportunity to explain his conduct. But in matters which are at a distance and of which the court cannot have so perfect a knowledge unless by the confession of the party or the testimony of others, the proper course, in the case of inferior Courts of Record, is to proceed by indictment, and in the case of superior Courts of Record by attachment. Courts not being of Record have of course no common law power to commit for contempt of either description" (a). But, so as not to leave inferior courts quite without protection, the King's Bench Division of the High Court in the recent case of *Rex v. Davies* (b) revived and rehabilitated the power anciently possessed by the King's Bench to punish, as the *custos morum* of the kingdom, every kind of misdemeanour on a summary proceeding as well as on indictment or information; and in exercise of this power, the High Court in England may summarily commit offenders for contempt of inferior courts also.

Contempts of Courts not of Record, summarily punishable by King's Bench.

35. "The process of attachment", it is stated, "is as ancient as the law itself, and no person, not even a Peer or a member of Parliament, is exempt". "A power therefore," the writer continues (c), "in the Supreme Courts of Justice to suppress such contempts by the attachment of the offender results from the first principles of a judiciary and must be an inseparable attendant upon every superior tribunal". The logical connection between the two propositions is not apparent, nor why the power should be restricted in its exercise to superior tribunals only. The historical explanation of the differentiation between the privileges of the superior and inferior courts in this matter I have already given. But there are other more cogent reasons why the power should not be freely given to all tribunals. Judges like legislators are apt to form an exaggerated notion of their own dignity.

Power of summary committal liable to abuse.

Various views as to its rationale.

(i) Blackstone's.

(a) Stephen, Commentaries on Blackstone, 16th Edn., Vol. IV, p. 276.

(b) L. R. (1906) 1, K. B. 32 (1905).

(c) Stephen, Commentaries on Blackstone, 16th Edn., Vol. IV, p. 277.

Even High Court judges, according to the testimony of an eminent High Court judge ( Lord Brampton ), are not free from this weakness. In his *Reminiscences* (referring to the days when he was still practising as counsel) he wrote: "Some of them were overwhelmed with the importance of their position, none were ever modest enough to perceive their own small individuality amidst their judicial environment". (a) Wilmot, J. appears to have been suffering from an acute attack of it when he penned his famous opinion in *R. v. Almon* (b). He wrote (c): "The principle upon which attachments issue for libels upon courts is to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public....A libel upon the court is a reflection upon the King." Since the date of this opinion, however, the *rationale* of the power of summary committal has been revised by High Court judges themselves. In *In re Johnson* (d), Bowen, L. J., said that the law had armed the High Court of Justice with power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice; it was not on any exaggerated notion of the dignity of individuals that insults to judges were not allowed; it was on the same ground that insults to witnesses or jurymen were not allowed. In *McLeod v. St. Aubyn* (e), Lords Watson, Macnaghten, Morris and Davey were of opinion that the power was not to be used for the vindication of the judge as a person. "He must resort to action for libel or criminal information." In *Arnold v. King Emperor* (f), Lord Shaw in delivering the judgment of the Judicial Committee said it was a false and dangerous doctrine that some privilege or protection attaches to the public acts of a judge which exempts him in regard to these from free and adverse comment. "He is not above criticism, his conduct and utterances may demand it; freedom would be seriously impaired, if the judicial tribunals were

(ii)  
Wilmot J's.

(iii) Recent  
opinions.

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(a) The *Reminiscences* of Sir Henry Hawkins (Baron Brampton), Edited by Richard Harris, Ch. XXVI p. 193.

(b) Wilmot, 254 (1765),

(c) The opinion was never delivered, proceedings having been withdrawn.

(d) 20 Q. B. D. p. 68 at p. 71 (1887).

(e) (1899) A. C. 549.

(f) 18 C. W. N. 785 : I.L.R. 41 Cal. 1023 (1914).

outside the range of such comment"; and it is refreshing to find it stated on the authority of numerous cases in a recent statement of the law on the subject, "that the court discourages applications for attachment for committal when the contempt is slight" (a). The power however remains for use or abuse by the superior courts of England and all Courts of Record in the British Dominions and by other courts specially authorised in that behalf by statute, and it does confer on judges in the British system to-day a legal character scarcely possessed by any other authority under the King and the Houses of Parliament.

36. Lastly, of the special protection by which the criminal law of England guards the persons and the reputation of her judges, the following deserve notice. (i) By the Treason Act of 1351, it is high treason *inter alia* to slay judges of the High Court of Justice, Justices of Assize, Justices of Oyer and Terminer, being in their places and doing their offices (b). (ii) Seditious words with regard to the administration of justice in a superior court whether spoken in or out of court are punishable by indictment or information, or summarily by attachment for contempt by the court whose proceedings are defamed. Such words spoken of an inferior Court of Record are punishable summarily by that court, if they are spoken in the face of the court (c). (iii) An indictment or information will not lie for insulting words spoken to or of a judge or magistrate when he is not sitting as such, unless the tendency of the words is to provoke a breach of the peace, but scandalising a judge by personal scurrilous abuse of him as a judge or any act done or writing published which is calculated to bring a court into contempt or to lower the authority of the judge of the court is contempt of the court and is punishable by indictment or information as well as by summary process of committal (d). But honest though adverse criticism in temperate language of the conduct of a judge is permissible and much latitude will in such cases be allowed, *R. v Grey* (e).

(vi) Special protection of criminal law.

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(a) Halsbury, Laws of England, Vol. VII, p. 287.

(b) *Ibid.*, Vol. IX, p. 450.

(c) *Ibid.* p. 461.

(d) *Ibid.* p. 502.

(e) (1900) 2. Q. B. 36 at p. 40.



In India  
(i) Power to  
organise  
courts.

Courts estab-  
lished either  
under Parlia-  
mentary sta-  
tute or by  
local Indian  
legislation.

37. Turning now to India, the organisation and constitution of courts of all descriptions in this country are now regulated by law, and executive discretion so far as it is allowed to interfere with the judicial organisation of the country is such as is given to Government by statute. Between 1765, the date of the grant of the Dewani and 1781, there were, in the Presidency towns, courts established by statute of Parliament, but alongside of them, the Company had established for the Provinces a hierarchy of tribunals possessed of civil and criminal jurisdiction, in the exercise of the sovereign power which it claimed to have derived from the Moghul Emperor. But these too in 1781 obtained Parliamentary recognition and the Sudder Dewani Adalats became King's Courts by statute, and from that time onward the organisation of courts of law, civil, criminal and revenue, has been by statute or by power given by statute. Between 1781 and 1861, there were for the Presidencies and Moffussil areas two parallel systems of courts, one set deriving authority directly from Parliamentary statutes, the other from local legislation. At present the Chartered High Courts are the only courts established under Letters Patent issued in execution of authority given to the Crown by Parliament, but the other courts are courts organised by Indian legislation.

Constitution  
of civil and  
criminal  
courts other  
than Char-  
tered High  
Courts.

38. The civil courts other than the Chartered High Courts of Bengal, Bombay, Allahabad, Madras and Patna, have been constituted by various local Civil Courts and Small Causes Courts Acts and other special enactments. The criminal courts at present depend for their constitution and organisation on the provisions mainly of Chapter II of the Criminal Procedure Code of 1898. It is unnecessary for my present purpose to consider the organisation of the courts in India in detail, even were not such a task rendered superfluous by Mr. Cowell's Tagore Law Lectures for 1872, in which the subject has been considered with much fulness both historically and with reference to existing arrangements (a)

Special  
courts under  
the Defence  
of India Act  
—a tempo-  
rary expe-  
dient,

39. It may be observed in passing, that under subsec (1) to sec. (3) of the Defence of India (Criminal Law Amendment) Act, 1915 (IV of 1915), the Executive have taken powers to

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(a) Cowell, *The History and Constitution of the Courts and Legislative Authorities in India*, Fifth Edition, 1905.

remove the trial of certain offences from the ordinary courts in order to have them tried before commissioners, specially appointed for that purpose. This, however, like the internment of citizens by administrative orders, under powers given by the same Act, is but a temporary departure from settled constitutional practice which under the Act is to remain in force during the war (a), and for six months after its termination.

40. As in England the law courts in India are hierarchically organised and the judicial business of the inferior courts is under the superintendence, direction and control of the higher judiciary. All judges in India however, from the judges of Chartered High Courts downwards, hold office *durante bene placito*. Under sec. 102 of the Government of India Act, 1915, every judge of a Chartered High Court is appointed by and holds his office during the pleasure of the Crown (b). Under the provisions of Provincial Civil Courts Acts, judges of Chief Courts (e. g. of the Punjab) are appointed by the Governor General in Council and hold office during his pleasure, whilst in provinces in which the highest tribunal of civil justice is the Court of the Judicial Commissioner, the judges of such courts are appointed by the Local Government and may be dismissed by it with the previous sanction in either case of the Governor General in Council. Judges of subordinate civil courts are appointed and may be dismissed by the Local Governments. The High Courts and District Courts have generally certain powers of suspending judicial officers of the lowest grade pending inquiry into their conduct, but the final authority in the matter of removal and suspension of subordinate judicial officers is the Local Government.

(ii)  
Hierarchic  
organisation  
of Indian  
judiciary.

Tenure of  
office, during  
pleasure, for  
(1) High  
Courts  
judges.

(2) Judges of  
other civil  
courts.

41. Under sec. 26 of the Criminal Procedure Code, all judges of criminal courts other than the High Courts established by Royal charter and all magistrates may be suspended or removed from office by the Local Government

(3) Of criminal  
courts.

(a) The war which, as these pages are being seen through the press, has been brought virtually to an end by the armistice of 11th November 1918.

(b) Compare the tenure of French colonial judges who may be dismissed by the President, judges (other than the justices of the peace) in France who all have a good behaviour tenure not being liable to dismissal without the consent of the Court of Cassation. Ogg, Governments of Europe, p. 337-341.

provided that such judges or magistrates as are now liable to be suspended or removed by the Governor General in Council only shall not be suspended or removed from office by any other authority. Under sec. 27 of the Act, the Governor General in Council may suspend or remove from office any justice of the peace appointed by him and a Local Government may suspend or remove from office any justice of the peace appointed by it.

In fact, it is for life.

Public Servants (Enquiries) Act.

42. In practice, however, no judge of any court is ordinarily removed from office without grave cause, and in order to ensure that this should be so, hardly any judicial officer is actually removed without a judicial enquiry held by commissioners specially appointed for each case under the "Public Servants (Enquiries) Act of 1850. This Act, which by its last section expressly declares that it was not to be construed to affect the authority of Government of suspending or removing any public servant for any cause without an enquiry under the Act is markedly illustrative of the habit of the Government of India, already commented on, of regulating the discretion which it undoubtedly possesses under the law, by statutory rules.

Promotion] and transfer

43. Whilst the tenure of judges and magistrates would thus appear to be in substance permanent, the Executive Government retains full control over the promotion and transfer of judges of District and Sessions courts and of judges and magistrates presiding over criminal courts, whilst promotion and transfer of judges of subordinate civil courts have been handed over almost wholly to the High Courts and other superior courts (a).

(iii) Jury trial in India in criminal cases only.

44. In India, there is no trial by jury in civil cases and trial by jury in criminal cases also has not made much progress. Under sec. 267 of the Criminal Procedure Code, all offenders who have been committed to the High Court Sessions have to be tried by a jury of nine persons, whilst trials before Mofussil Sessions Courts may be either by jury or with the aid of assessors (sec. 268). Under sec. 269, the Local Government, with the sanction of the Governor

And that within narrow limits.

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(a) This at least appears to be the case in Bengal. See Rules of the High Court of Judicature at Fort William in Bengal, Appellate Side, 1914, pp. 1 and 3.

General, by order in the official gazette, may direct that the trial of all offences or of any particular class of offences before any Court of Sessions shall be by jury in any district and may with the like sanction revoke or alter such order. Whether an offence shall be tried before a special and not a common jury is also made to depend upon the pleasure of the Local Government which has power to revoke an order permitting trial of particular offences by special juries. The power thus given to Local Governments was plainly intended to be exercised in a liberal spirit to the end that all sessions trials should ultimately be with juries. If this was in fact the intention, it has not been fulfilled in any appreciable measure. It should be remarked further that the verdict of the jury in India is not required for its validity to be unanimous as in England and the verdict of the majority is not, except in certain circumstances at sessions trials in at the High Courts, binding on the court (a).

45. Except in so far as it may have been modified by statute, the immunity of jurors and judges would naturally be the same in India as in England.

(iv) Immunity of judges and jurors in India.

46. As in England, so in India, judges are criminally liable for particular species of misconduct in office. The provisions of secs. 124, 127 and 129 of the Government of India Act of 1915 are wide enough to expose a judge of a Chartered High Court to prosecution in India as well as in England for (i) "oppressing any British subject within his jurisdiction or in the exercise of his authority", (ii) receiving presents, and (iii) committing any wilful breach of the trust and duty of his office, and subject him to the penalties of fine and imprisonment etc. provided for in those sections. Nevertheless, neither the chief justice nor any other judge of such a court is liable to arrest or imprisonment by any High Court acting in the exercise of its Original Jurisdiction (sec. 110 of the Government of India Act 1915) or by any Presidency Small Cause Court (sec. 93 of Act XV of 1882). In common with other public servants, a judge may expose

Criminal liability for judicial misconduct of High Court judges.

High Court judges not liable to arrest or imprisonment by the Original Sides of High Courts and Presidency Small Cause Courts.

(a) In civil suits in America, there is scarcely a State that does not permit the jury trial to be waived with the consent of both parties. Some of the newer ones have gone further and do not require a unanimous decision. Ashley, *The American Federal State*, pp. 466-467.

Criminal responsibility as public servant.

himself, by taking illegal gratification, to prosecution under sec. 161 of the Penal Code ; and under sec. 167, by framing, with intent to cause injury, an incorrect record, e. g. a record of depositions. He may be prosecuted, under sec. 217, for knowingly disobeying the directions of law with intent to save persons from punishment or their property from forfeiture, and under sec. 218, for framing an incorrect record or writing with similar intent. A judge or juryman corruptly or maliciously making or pronouncing in any stage of a judicial proceeding any report, order, verdict or decision which he knows to be contrary to law is punishable under sec. 219 with imprisonment of either description for a term which may extend to 7 years or with fine or both, and a similar punishment may be awarded to any public officer who corruptly or maliciously commits for trial or confinement any person knowing that in so doing he was acting contrary to law. No prosecution of a judge or magistrate in India can, however, under sec. 197 of the Criminal Procedure Code, be instituted without the previous sanction either of the Government of India (in cases of officers who are removeable by that Government) or of the Local Governments (in cases of officers removeable from office by them) or of some court or other authority to which he is subordinate and whose power to give such sanction has not been limited by such Government. That section further leaves it to the Government concerned to determine the person by whom, the manner in which and the offence or offences for which the prosecution of the judge or magistrate is to be conducted and may specify the court before which the trial is to be held.

But no prosecution without Government sanction.

Criminal responsibility for consequential injuries.

47. Upon the question of the criminal liability of judges and magistrates for injuries consequential on their judicial acts, sec. 77 of the Indian Penal Code provides that "nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is or which in good faith he believes to be given to him by law". Though there are no reported decisions upon the section (and sec. 197 of the Criminal Procedure Code just referred to may be responsible for it), it may be gathered from the language of Baron Parke's judgment in *Calder v. Halket* (a),

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(a) 2 M. I. A. 293, at pp. 306-307 ; 3 Moo. P.C.C. 28 (1839).

that this section is intended to protect judges and magistrates from criminal prosecution even when they have acted beyond their jurisdiction provided that, after exercising due care and caution, they *bona fide* believed that in acting as they did, they were exercising powers given to them by law. From that judgment it also appears that the protection of the section should cover not merely acts in court *sedente curia*, but all acts of a judicial nature.

48. As to the civil liability of judicial officers in India, Act XVIII of 1850 provides that no judge, magistrate, justice of the peace, collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the exercise of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or order the thing complained of."

Civil responsibility of judicial officers in India.

49. It has been observed before that in England, justices of the peace and other such magistrates are civilly answerable for wrongs done by them maliciously though within their jurisdiction, but that judges of Courts of Record are protected from action however maliciously they might have acted, if what they did was within their jurisdiction, but that in respect of wrongs committed beyond their jurisdiction justices of the peace and other such magistrates are liable in all cases whilst judges of Courts of Records are immune even in respect of such acts provided they acted without malice and without knowledge (or means of knowing) the defect of jurisdiction.

50. Act XVIII of 1850 appears to make absence of jurisdiction by itself immaterial in cases of judges and magistrates alike, provided there was *bona fide* belief in the existence of jurisdiction. It is only touching his belief in the possession of jurisdiction, not in the manner of its exercise, that good faith on the part of the magistrate or judge is demanded by the section, and thus proof of malice in the performance of an act *bona fide* believed by the judge or magistrate to have been within his jurisdiction will not deprive him of its protection, though malice exhibited in the trial itself may afford evidence of *mala fides* in the assumption of jurisdiction. "Good faith" of course implies due care and caution, or, in the language of

Act XVIII of 1850.

Lord Campbell in *Spooner v. Juddow* (a), the judge or magistrate must *bona fide* and not absurdly believe that he was acting in pursuance of statutes and according to law. The mistake may be one of fact or of law ; but in neither case will the protection of the section be available if the mistake was so irrational that it could be ascribed only to perverseness, malice or corruption. *Seshaiyengar v. Ragunatha* (b) ; *Ragunada v. Nathamuni* (c) ; *Collector of Sea Customs v. Chithambaram* (d).

No sanction of Government necessary for civil action.

51. It should be remarked that no sanction need be had from Government or any other authority for instituting civil actions against judges or other public servants for wrongs done by them in their official capacity, but under sec. 80 of the Civil Procedure Code, they are entitled to two months' previous notice apprising them of the cause of action, the name, description and place of residence of the Plaintiff and the relief which he claims. Under sec. 81 of the Code, they are in common with other civil officers exempt from arrest and their property from attachment otherwise than in execution of a decree, and if the court is satisfied that the defendant officer cannot absent himself from duty without detriment to the public service, from appearing in person ; and under Or XXVII, r. 7, the court trying such an action is required to grant time to the defendant to make reference to Government with a view, if Government is so advised, to its assumption of the defence of such officer at the public cost. Under sec. 135 of the Code, no judge, magistrate or other judicial officer is liable to arrest under civil process whilst going to, presiding in or returning from his court.

(iv) Power of committal for contempt.

52. As to the power possessed by judicial officers in India to commit for contempt, this may follow either from the fact of the courts over which they preside being Courts of Record, or, if they are not Courts of Record, from authority given by statute. The Supreme Courts established in the three Presidency towns were Courts of Record, and the Sudder Dewani Adalat was made one when it received Parliamentary recogni-

Courts of Record.

(a) 4 M. I. A. 379 : 6 Moo. P.C.C. 257 (1850).

(b) 5 Mad. H. C. R. 345 (1870).

(c) 6 Mad. H. C. R. 423 (1871).

(d) 1, L, R, 1 Mad. 89 (1876).

tion. There is authority for the proposition that the Sudder Nizamut Adalat of Bengal during its term of existence never was a King's Court or a Court of Record. *Legal Remembrancer v. Mati Lal Ghose* (a). The Sudder Adalats and the Supreme Courts were combined to form the Chartered High Courts after 1861, and others were established, and all were constituted Courts of Record (b).

53. The Charter of 1752 had established Courts of Requests in the three Presidency towns to determine small claims and these courts were replaced, in 1853, by Courts of Small Causes which by the Government of India Act IX of 1850 were expressly made Courts of Record (c.) The present Presidency Towns Small Cause Courts Act, XV of 1882, does not designate these courts as Courts of Record, but Ch. XII of the Act embodies provisions for summary committal for contempts in *facie curiae*, so as to constitute them inferior Courts of Record in the English sense. No other Indian courts have been designated Courts of Record, and these, like the Presidency Small Cause Courts, since the enactment of Act XV of 1882, exercise powers of committal for contempt in so far only as such power may have been conferred on them by statute.

Presidency  
Small Cause  
Courts.

Other courts.

54. Of the power of a Chartered High Court to commit for contempt of itself, whether in *facie curiae* or out of court, there never has been any question (d). But it was held in *Legal Remembrancer v. Moti Lal Ghose* (e) that the High Court of Calcutta had no jurisdiction as *custos morum* to punish by summary committal contempts of Mofussil courts

Power of  
Chartered  
High Courts  
to commit for  
contempts of  
themselves  
and of Mofus-  
sil courts.

(a) I. L. R. 41 Cal. 173 (1913), at p. 207.

(b) Sec. sec. 106 of (the recently consolidated) Government of India Act of 1915

(c) The Courts of Requests subsequent to their establishment were given power to punish contempts in *facie curiae* by fines and imprisonments in default by local ordinances authorized by Parliamentary statutes. See Shaw's Charters of the High Court of Madras, for the proclamation of the Madras Government of 29th Dec. 1801.

(d) *Re : Abdool and Mahtab*, 3 W. R. (Cr.) 32 (1867); *Re : William Taylor* 26 C. L. J. 345 (1869); *Legal Remembrancer v. Mati Lal Ghose*, I L. R. 41 Cal. 173; 17 C. W. N. 1252 (1913); *Surendranath Banerjee v. Bengal High Court*, L. R. 10 I. A. 171; I. L. R. 10 Cal. 109 (1883); *Re : Sarbadhicary*, L. R. 34 I. A. 41; 11 C. W. N. 273; I L. R. 29 All. 95 (1906) and *Re : Tarit Kanti Biswas*, 21 C. W. N. 1161 (1917).

(e) I. L. R. 41 Cal 173; 17 C.W.N. 1252 (1913).



subject to its appellate jurisdiction, though an opposite conclusion had previously been reached by the Madras High Court in *In re : Venkat Rao* (a).

Power of Presidency Small Cause Courts.

55. The Presidency Small Cause Courts Act of 1882 gives power to these courts to punish, by summary procedure, by fine or imprisonment, certain contempts committed in *facie curiae* e. g. those coming under the following sections of the Indian Penal Code, viz: sec. 175 (omission to produce documents by a person bound to produce them), sec. 178 (refusing oath or affirmation when duly required by a public servant to make it), sec. 179 (refusing to answer questions), sec. 180 (refusing to sign statements) and sec. 228 (intentionally insulting or interrupting a public servant sitting in judicial proceeding) (b). The Court is not authorised to impose a heavier penalty for any such offence than a fine of Rs. 200, in default civil imprisonment for a term which may extend to one month unless the fine is sooner paid, the procedure when a heavier sentence is considered necessary being, under sec. 85 of Act XV of 1882, to send the case for trial to the ordinary criminal court. Under sec. 87 of this Act, a witness before a Small Cause Court who refuses to answer questions or produce documents may be sentenced to simple imprisonment or be committed to the custody of an officer of the court for any term not exceeding seven days, after which he may be dealt with according to the provisions of sec. 83 or 85. Orders passed under secs. 83 and 87 are made appealable (sec. 88).

Power of other courts.

56. As regard courts other than the Chartered High Courts and Presidency Small Cause Courts, similar provisions *mutatis mutandis* are made in secs. 480 to 486 of the Criminal Procedure Code (Act V of 1898). There does not appear in Indian statutes any provisions for the punishment of contempts not in *facie curiae* by summary committal by the courts concerned, and courts other than the Chartered High Courts cannot be said to possess this power.

(v) Special protection of criminal law.

57. Are judges in India protected by special provisions of the criminal law as judges in England? To slay a judge is no treason in this country, and the protection of sec. 124 of

(a) 21 M. L. J. 832 (1911).

(b) Act, XV of 1882, sec. 83.

the Penal Code applies only to the Governor-General, Governors, Lieutenant-Governors and Members of their Councils. I doubt whether sec. 124 A. can without much straining be made to cover what, if committed in England, would be punished as seditious libel concerning the administration of justice in the superior courts. Lastly, neither the scandalising of courts and judges outside the court house, nor unfair reports of judicial proceedings, nor comments on pending cases which may possibly prejudice fair trial have been made offences by the Penal Code or any other statute. A judge or magistrate like any private person may take proceedings for such defamation or intimidation as is made punishable by the Penal Code. But other forms of abuse and intimidation of courts and judges, assuming they need correction, are not crimes under the Penal Code. But the Penal Code did not repeal penal laws in force at its enactment, and, in 1860, the common law unquestionably applied within the jurisdiction of the Supreme Courts in the Presidency towns, and all the varieties of offences specified above were at that time offences which might be proceeded against by indictment or information within the limits of that jurisdiction. In fact, if publishing remarks and criticisms abusing the judges in newspapers had not been a criminal offence punishable in the ordinary way, they could not be punished by summary committal for contempt—this latter being only an alternative method of trying offences triable in any case upon indictment or information. The common law still applies within the jurisdictional limits of the Original Sides of the Chartered High Courts, and therefore within those limits all the above mentioned acts presumably continue to be offences punishable by indictment or information, and as the Chartered High Courts are Courts of Record, they can punish such of them as are contempts, if committed within those limits, by summary committal, *Surendra Nath Banerjee v. The Judges of Bengal* (a). But are any of those acts, if committed in the Mofussil, even with reference to the High Court and High Court judges, punishable either by indictment or information? It has been held by Jenkins, C. J., in *Legal Remembrancer v. Mati*

Hardly any  
by statute.

But exists  
under com-  
mon law in  
so far as  
latter appli-  
cable.

Is contempt  
of court a  
common law  
offence in the  
Mofussil?

(a) I. L. R. 10 Cal. 109 (1888).

*Lal Ghose* (a) that contempts of Mofussil courts not made offences by the Penal Code are not offences under the common law because the common law does not apply in the Mofussil. The *Sudder Dewani Adalat* was a Court of Record, but if the common law did not apply in the Mofussil, it is not clear that a contempt of the High Court (as successor of the *Sudder Dewani Adalat*) committed in the Mofussil and not amounting to an offence under the Penal Code is any crime at all, punishable either on indictment or by summary committal. If this be so, it would seem to follow that the Chartered High Courts of Allahabad and Patna, though Courts of Record, have no jurisdiction to punish contempts not covered by any section of the Penal Code upon indictment, still less by committal. In *In re Sarbadhicary* (b) however (a case from Allahabad), the Privy Council observed that there was no doubt that the publication of the libel in that case constituted a contempt of Court which might have been dealt with by the High Court in a summary manner by fine or imprisonment or both. This it could do only on the assumption that interferences with the administration of justice outside the Presidency towns are common law offences and that is what Sir Lawrence Jenkins appears to have assumed in *Legal Remembrancer v. Moti Lal Ghose* (c). I was, it will be remembered, confronted with the same difficulty in considering the applicability of the English law of high treason in India in dealing with the legal relations of the Sovereign in India, viz. whether an offence against the person of the King, which would be high treason if committed in England, would be one if committed in Calcutta or in Patna? All these difficulties disappear if it is once assumed, as I find no difficulty in doing, that every fresh accession of territory in India to the British Crown made the common law of England applicable, modified of course, in greater or less degrees, by circumstances, amongst which must be reckoned the systems of personal law prevailing in those territories and the rule, sanctioned by legislation, of justice, equity and good conscience.

Application  
of common  
law outside  
Presidency  
towns.

In the United  
States.

58. In the Federal Government of the United States of America, the Supreme Court has been created by the consti-

(a) I. L. R. 41 Cal. 173 : 17 C.W.N. 1252 (1913).

(b) 11. C. W. N. 273 (P. C) : L.R. 34 I.A. 41 (1906).

(c) 17 C. W. N. 1252, at p. 1282 : I. L. R. 41 Cal. 173, at p. 215 (1913).

tution whilst inferior courts depend for their existence upon the will of the legislature (a). All courts, State or Federal, are in fact organised by law whether that law be the supreme law of the constitution or laws passed by the legislatures. The Federal judges hold office during good behaviour, determinable by the legislature through the process of an impeachment trial. All Federal judges are nominated by the President, confirmed by the Senate and commissioned by the President. The judges of most of the State courts are elected, generally by the people, in a few cases by the legislature, but in several States they are nominated by the Governor and appointed by or with the advice and consent of the Senate. In New Hampshire, they are appointed by the Governor by and with the advice of the Council. The terms of the judges range from two years to a tenure during good behaviour. The constitutions of more than three-fourths of the States permit the removal of judges by the legislature or by the Governor at the request of the legislature. In Florida, Massachusetts and Rhode Island, all judges of the higher courts hold office during good behaviour, in New Hampshire until 70 years of age. The length of the term varies with the grade of the court, the tendency being to give longer terms to judges of the higher courts (b). In 1911, Arizona, then aspiring to become a State proposed to include in its constitution a clause authorising the recall of judges by vote of the electorate. The then President, Mr. Taft, at one time a judge of the Supreme Court himself, vetoed the proposal, which having been abandoned, Arizona was, on 4th February 1912, admitted into the Union on "an equal footing with the other States". On November 12th following, the newly admitted State vindicated this equality by an amendment of its constitution providing for recall of its judicial officers. Nevada in 1912 and Oregon in 1908 and California in 1911 had already preceded her and Kansas followed suit in 1914. With Kansas, the movement in favour of the recall of judicial officers appears to have spent its force (c).

(i) Organisation of courts

(ii) Tenure of judges.

Recall of Judges.

(a) Burgess, *Political Science and Constitutional Law*, Vol. II, p. 321.

(b) Wilson, *The State*, p. 540. See also Table III. in Appendix G. to Ashley's *American Federal State*, 1911, pp. 654-616.

(c) Root, *Addresses on Government and Citizenship*, p. 387.

Election of judges, objections to.

59. The elective tenure of judges is in the abstract certainly open to criticism as detrimental to judicial independence, but it does not on the whole work unsatisfactorily in America. If the elective tenure, specially when the terms are short, may tend in weak minds to produce susceptibility to popular favour, permanency of tenure coupled with absence of *all* control has an equally decided tendency in minds similarly constituted to breed arrogance, and where, moreover, appointments to judicial offices are treated as mere matters of distribution of patronage, to the perpetuation of judicial incompetence; of these alternative modes of filling judicial offices, supposing there were no other, one need have no difficulty in deciding which should be preferred, and regard being had to present conditions of public morality in most countries, a foreign critic would do well to pause in humble self-examination before proceeding to condemn the choice of the Americans.

Assaults on judges a crime against justice.

60. I shall not examine the legal relations of the American judiciary in detail on other points, since in regard to them there does not appear to be any substantial difference between their position and that of English judges and magistrates. As in England, assault on a judge sitting in court is not only punishable as contempt, but is indictable as a crime against public justice. An assault on a Federal judge is regarded as a breach of the peace of the United States (a).

In other countries.

Their debt to England.

(i)  
Organisation of courts.

61. As in the organisation of the legislature and its relations to the executive, so in the organisation of their judiciary, the nations of Europe and America have naturally profited by the experiences of English history. The constitutions of most countries expressly give the power of organising courts of law, even administrative courts (e.g. in Holland and Japan), to the legislature in so far as the same is not provided for by the constitutions themselves, and some constitutions (e.g. of Switzerland) go so far as to expressly prohibit the setting up of special or extraordinary tribunals.

(ii)  
Tenure of judges.

62. Except in Mexico, where the judges of the Federal Supreme Court are chosen by a process of indirect election, and

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(a) Bouvier's Law Dictionary, Title, "Judge." See also the article on "Trial by Jury and the Reform of Civil Procedure" in 31 Harvard Law Review, pp. 669-691.

in the State Governments of the United States of America, everywhere judges are appointed by executive nomination. But some constitutions, e.g. those of Belgium and Austria (the latter in so far as concerns the *personnel* of the highest administrative court, the Reichsgericht) improve upon both the election and nomination systems of appointing judges by restricting the choice of the executive to persons nominated, in Belgium by the Senate and the courts, and in Austria by the Reichsrath (a).

63. As regards the tenure of judges, the general practice is in favour of making the office tenable during good behaviour. But in Switzerland the tenure of the higher justices is like that of the judges of the Supreme Court in Mexico limited to a definite term, the members of the Federal Tribunal in the former country and those of the Supreme Court in the latter being appointed for terms of six years. As to the mode by which tenure during good behaviour is secured, removal is made to depend upon the result of a trial by impeachment as in England and the United States (e. g. in the Argentine Republic and Mexico) or, as is more generally the case, upon conviction after a regular trial in a court of law or discipline of offences defined by law. In Belgium, a judge can be removed only by the unanimous vote of his brother judges. The Swedish constitution alone contains a provision according to which every third year, a committee of the Riksdag holds an investigation on the work of the judges and decides which of them should be honourably relieved on half pension though no crime triable before a court of impeachment should have been committed—a far more effective method of removing incompetent occupants of high judicial offices than a joint address of both Houses of the legislature as is provided in the (English) Act of Settlement of 1701.

64. In Italy, the independence of the judiciary, it is said, is weakened by the power, the executive possesses, of assigning judges to their stations, because a magistrate who refuses to show the desired degree of submission to it may be transferred

Promotion  
and transfer.

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(a) Judges of the highest court in Germany are appointed by the Emperor on the nomination of the Bundesrath and in Holland by the King out of a list prepared by the Lower House. See Ogg, *Governments of Europe*, pp. 244, 531.

to a less desirable station in another part of the country. This practice is expressly condemned in the constitutions of Sweden, Belgium, Denmark and Germany, amongst others, by provisions making it unconstitutional to transfer to another district (and in Sweden even to promote) a judge without his consent. In Germany, however, this may be ordered as a punishment by a section of the Court of Discipline and is also permitted when made in consequence of the reorganisation of the judicial system, in which case the judge so transferred may be assigned to another station of equal rank and pay and with an allowance sufficient to cover the cost of changing his residence.

(iii)  
Jury trial.

65. I have already noticed the fact that the jury system of trial, at any rate for criminal trials, and in particular for trials of political offences, has been largely adopted outside England (a).

(iv)  
Immunity  
of judges.

66. The immunity of judges does not appear to have developed as well outside Anglo-Saxon countries as within them. Apart from the fact that they are removeable from office for cause to be determined by a sentence of a judicial tribunal, judges appear to be liable to action for violations of law and wrongful acts and even neglect in the performance of their duties, the liability being determined by law (see the constitutions of Chile, Mexico, Belgium, Portugal, Spain, and Sweden which have express provisions to that effect). Art 505 of the French Code of Civil Procedure provides that a judge may be sued in the following cases: (1) if there be malice, fraud or corruption alleged to have been committed in the course of the examination, or in rendering judgment; (2) if the right to sue be expressly given by law; (3) if the law declares the judges liable in damages; (4) if there be denial of justice; whilst the German Imperial Court has decided that a judge may be held liable if he perverts justice deliberately, but must not be held responsible for errors in rendering judgment (b). I gather from a statement in an article on Contempt in the *Encyclopedia Britannica*, that the procedure of summary committal for contempt is not known outside the British Empire and the United States (c). Whether

(a) The system of trial by jury has not won its way into the administrative system of Holland. See Ogg, *Governments of Europe*, Title, Holland.

(b) Freund, *Cases on Administrative Law*, p. 280, note.

(c) *Encyclopedia Britannica*, 11th Edn., Article on "Contempt."

they are protected by special provisions of criminal law above and beyond officials in general, I have not been able to ascertain, but presumably they are not. Outside Anglo-Saxon countries, they do not also appear to be very well paid—for the simple reason that the practice of selecting judges, for the higher tribunals at least, from amongst the leaders of the bar is confined to those countries only (a).

## LECTURE XVII. OF MINISTERS AND HEADS OF DEPARTMENTS.

1. It has been noticed before how in most modern forms of government, the irresponsibility before law of the Supreme Executive has been sought to be counterbalanced by expressly making his ministers legally responsible for all acts and orders of the Government. The further phase of the same movement which, by tending to reduce the position of the Supreme Executive to one of political irresponsibility, has led the way towards making the ministers responsible for their *policy* also to the elected representatives of the sovereign people, bears upon the question of the organisation and constitution of ministries—a subject which has been already dealt with in a previous lecture. This topic does not call for direct treatment under the head of legal relations though reference will be made to it in so far as it may indirectly affect the legal relations of ministers. Under the present head of legal relations, I shall try to indicate the nature and limits, if any, of the legal responsibility of ministers and heads of departments, criminal and civil, in so far as they go to mark off their legal position from that of the Chief Executive on the one hand and of ordinary officials on the other.

Legal responsibility of ministers distinguished from their political responsibility.

2. The primary object of all those provisions in the constitutions of most States on the Continent of Europe and of

The principle of ministerial responsibility as formulated in non-English constitutions.

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(a) Upon the constitution and organisation of the judiciary in foreign countries, see Garner, *Introduction to Political Science*, Ch. XVII., and Dodd's *Modern Constitutions*. I have noticed complaints in recent issues of legal periodicals from America regarding the low pay of the judges of Federal District and Circuit Courts. Judges of State Courts it is said, are quite handsomely remunerated in comparison.



the Latin Republics of America, which require for the validity of all acts and orders done or issued in the name of the Supreme Executive that they shall bear the signature or otherwise carry the assent of a minister or ministers, is no doubt to make the latter answerable for all violations of law involved in any such act or order, with a view ultimately to enable aggrieved individuals to have their remedy against them in courts of law. Like many another institution of public law, the principle of the responsibility of ministers has been borrowed by these nations from the administrative law of England. But whereas in England the principle is but a special application of a general rule which makes very official without exception responsible, whenever he should happen to overstep the limits of his legal powers as such, it made its entry into the administrative systems of the German and Latin States of Europe and America as an exception, an anomalous innovation, for the general rule which (after the victory of the King over the forces of Feudalism) established itself in the German and Latin States of Europe was that the King's officers, the agents of his policy, should be exempt from the jurisdiction of the ordinary courts which, as was pointed out in a previous lecture, had (throughout this struggle) consistently supported the Feudal order against the growing usurpations of the King. The retention of the principle of the responsibility of Royal or Princely officers before the ordinary courts would in fact have effectually prevented the Kings and Princes from destroying the Feudal system with all its abuses and pretended vested rights and would have made impossible the development of national States upon the Continent. The desire of the absolute Monarchy to reduce the Feudal nobility to submission and do away with Feudalism was thus the cause of the adoption on the Continent of the Roman principle that the officers of the Government might be sued by the individual, if at all, only after the consent of the administration to it had been obtained (a). In the result, the privileges which the

Borrowed from England, where it is natural.

On the Continent, an exotic in an uncongenial soil.

General rule on the Continent: Officers could not be sued without leave of the State.

(a) Goodnow, Comparative Administrative Law, Vol. II, p. 171 The courts in England, as distinguished from those on the Continent, were Royal courts and the agents and pliant instruments of the Royal will, until very late in their history, by which time the consolidation of England as a national State had been fully accomplished. Thus there never was any occasion in England to question the jurisdiction of these courts over official acts as there was on the Continent.

nobles enjoyed under the Feudal regime were as nothing in comparison with those with which officials found themselves endowed under the Monarchy for the purpose of bringing this struggle to a successful issue in the Royal interest. But even a highly privileged bureaucracy, as I have pointed out more than once, is preferable to the disorganised rapacity and unrestrained oppression of a Feudal nobility.

3. It is obvious that so long as it lay with the administration itself to finally determine whether complaints should be allowed to be taken to a court of law against a member of its own body, responsibility before law of public officials did not exist. The doctrine of the responsibility of ministers, borrowed from English public law, appears indeed to have been the first consciously directed attack upon the citadel of privilege which officialism had reared upon the ruins of Feudalism. The breach has been so far widened that it is no longer necessary, in France and Germany at any rate, to obtain the leave of the administration itself to sue one of its members. But if a suit is brought against an official in an ordinary court it is still open to the administration to relieve the defendant of personal responsibility by adopting the act at its own, and at the same time to have the suit transferred for trial to an administrative court composed of officials more or less actively engaged in administrative work—a court which in dealing with the matter in controversy is expected to consider it, not from the point of view of private but of public law, or, in plain language, to pay greater regard to the supposed interests of the State than to those of individual who may be affected by its operations. It would, of course, be inaccurate to say that this transfer from the ordinary to the administrative court takes place at the present day at the mere will of the administration. The administration can only “raise a conflict”, which must then be referred to a special Tribunal of Conflict or Competence (a), and it is for this court to say finally whether the suit should proceed against the offending official in the ordinary court as for a violation of law too gross and palpable to be treated as an official act, or whether the act being pro-

The doctrine of ministerial responsibility, the first breach in the privileged position of officials on the Continent.

Legal responsibility of officials generally, as it exists to day on the Continent.

Power of State to assume responsibility for the official's act and have it tried before an administrative court.

Raising a conflict.

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(a) As stated below there is no Court of Competence in the Imperial administration of Germany, the Civil Courts themselves having authority to decide this like any other question of jurisdiction,

**Functions of  
Courts of  
Conflict or  
Competence.**

perly regarded as official, its propriety should be examined as between the complainant and the State from the official point of view by a court of expert officials. This Tribunal of Conflict or Competence was formerly in both France and Germany composed entirely of officials, so that it was really the administration which determined the nature of the act and the court which was to try it. Since 1872, however, the French Tribunal has been composed of an equal number of officials and judges, the Minister of Justice (an official) presiding and having the casting vote. The Imperial administration of Germany has done away with conflict altogether by giving the ordinary courts themselves power to decide the matter along with other jurisdictional questions, whilst the Courts of Competence in the principalities which have administrative courts (a) have, under Imperial statute, to be composed of an equal number of judges of the higher Imperial courts and officials who, however, must be appointed to the office for life (b).

**Unsatisfac-  
tory working  
of ministerial  
responsibility  
on the Conti-  
nent.**

4. For all this progress, however, towards an approximation to English conditions, it has to be admitted that the principle of ministerial responsibility has not found congenial soil in the administrative systems of the Latin and German countries on the European Continent. The principle does not in fact work satisfactorily in practice in any of those countries.

**"Acts of go-  
vernment"  
excluded  
from judicial  
examination  
altogether.**

5. We have, in the first place, to remember that the laws of those countries regard certain categories of acts of officials, performed even in normal times, as so intimately connected with public safety as not to admit of examination by either ordinary or administrative courts. "Acts of State", which English administrative law has banished from all litigation between subjects and Royal officials, receive on the Continent an interpretation so extended as virtually to place all citizens who have any serious differences with the administration entirely at the latter's mercy. For acts not treated as "acts of State" the civil and criminal responsibility, respectively, of ministers does not appear to stand on the same footing.

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(a) Oldenburg and most of the smaller States have none. See Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 349, 357.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 257-261. The principalities can at their option confer power to decide conflicts on the Imperial courts. *Ibid*, p. 258.

6. First as to criminal liability, Mr. Frank Goodnow feels assured that though the Parliamentary system has not taken root in Germany, the Constitutional system has, and the demand it makes that the legally irresponsible Prince shall exercise his powers through responsible ministers means that these latter should be responsible at any rate before criminal courts. But recognition of responsibility in the abstract is one thing and its actual enforcibility is quite another. In Prussia at the very moment when the constitution which was solemnly to declare the responsibility of ministers was taking shape (a), a Royal ordinance (of January 2, 1849) took away from the courts all power of criminal prosecution except at the instance of certain "public prosecutors" who were placed completely under the control of the ministry, with the result that a minister could be prosecuted, if at all, only at the instance of the ministry. This condition of things was further aggravated, when by a law of February 23, 1854, it was provided that before even a public prosecutor could initiate criminal proceeding against officers of the administration, the Competence Court at Berlin which was practically under the control of the ministry should first decide that there was a proper case for criminal prosecution. Since the establishment of the Empire, the functions of the Competence Court have been transferred to independent judicial tribunals who are only required to say whether the officer in question has violated his duties, and the monopoly of prosecution of the public prosecutors has been so far modified as to enable courts where the former have refused to act to initiate proceedings on the application of the complainant and appoint an attorney to conduct them (b). The responsibility of officials for criminal violations of the law has been barely saved from being reduced to a nullity by these improvements.

Criminal responsibility for acts other than "acts of government."

At first imperfectly realised in Prussia.

Through institution of "public prosecutors" and "competence courts."

Recent improvement.

7. With a view, however, to make the criminal responsibility, at any rate of ministers, more of a reality, the constitution of Prussia made ministers expressly liable to prosecution for treason, bribery, or violation of the constitution upon the vote of either legislative chamber. But the constitution having omitted to provide penalties, and there being no machinery to enforce it, this law of the constitution has remained a dead

Provision as to impeachment of ministers in Prussian constitution, nugatory.

(a) The Prussian constitution came into force on 31st January, 1850.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 188-189.

letter, and ministers have acted in violation of the constitution with absolute impunity (a).

Theoretically unlimited criminal responsibility of officials in France, curtailed by institution of "public prosecutors."

Minister not triable before ordinary courts but impeachable.

Impeachment displaced by Parliamentary responsibility of ministers.

Impeachment trials chiefly relied on by nations to enforce criminal responsibility of ministers.

8. In France, at the present day, the right of individual subjects to bring criminal proceedings against officials seems theoretically unlimited. But the right is seriously curtailed by the fact that the initiation and conduct of all criminal proceedings in that country are in the hands of public prosecutors who are appointed and removed at the pleasure of the President acting through the ministry; and though courts have power when civil proceedings have been instituted against an official to direct the public prosecutor to initiate criminal proceedings (b), this really does not carry matters much further, since the civil proceedings themselves are liable to removal to administrative courts. As in England, however, ministers [who, it appears, are not criminally liable before the ordinary courts (c)] are liable to prosecution by way of impeachment by the House of Deputies before the Senate, but being, as in that country, removeable at the will of the legislature, occasions for the application of this remedy can scarcely arise.

9. For enforcement of the criminal liability of ministers, reliance in most Continental countries of Europe and the Latin Republics of America is chiefly placed upon some method of trial by impeachment. Trial by impeachment is reserved in some constitutions expressly for crimes arising out of the offender's official acts (d), ministers like any other private persons being liable to prosecution for ordinary crimes in the ordinary way and without the sanction of any House of the legislature. The prosecution in impeachment trials is, as a rule, initiated by the lower House (e), but the court of im-

(a) Ogg, *Governments of Europe*, p. 214.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, p. 80.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 186-187.

(d) E. g. in Belgium, Hungary and Mexico. See Dodd's *Modern Constitutions*.

(e) No provisions exist in the Imperial Government of Germany and in the Kingdom of Prussia for bringing impeachment trials of the Chancellor and ministers. In most of the other members of the German Empire the constitution provides for impeachment, generally as in France, of ministers only—the causes for impeachment being the commission of crime or violation of the constitution. Impeachment may be undertaken by either House of the legislatures or by a concurrent resolution of the two Houses, and the Court of Impeachment is usually the highest judicial court or a special court

peachment is not in every country the Upper Chamber. It is in Spain, Portugal, the Argentine Republic, Chile and Mexico. But several States have special courts of impeachment consisting either of a panel of the Upper House or a mixed court of senators and judges (e. g. Austria, Hungary, Sweden, Norway and Denmark), whilst in several others, the highest court of the land tries ministers and other high officials upon impeachment at the instance either of the Crown or of the Lower Chamber (e. g. in Holland, Belgium, Italy, Brazil). Under the constitution of Chile, a private person may prosecute a minister for ordinary crimes before the ordinary tribunals with the sanction of the Senate (a).

Courts of impeachment outside England and the United States.

10. In Switzerland, no official (and hence too no member of the Federal Council) can be criminally prosecuted without the consent of the Council or the Federal Assembly (b).

Criminal prosecution of officials in Switzerland.

11. As regard civil liability, in France, any public officer may be mulcted in damages in the ordinary courts at the suit of an aggrieved subject provided the court is of opinion that the act though done in the discharge of public functions involved such grave personal misconduct that it could not fairly be regarded as an official act. But the final decision in this matter does not rest with that Court, for the administration, by "raising a conflict," may take it to the Tribunal of Conflict which then proceeds judicially to determine whether the act in question is in fact a personal wrong on the part of the individual official or an act of the administration. If the former, the case goes back to the ordinary court for disposal, if the latter, jurisdiction belongs to the administrative court, and the party defendant before it is no longer really the official but the administration (c).

Civil liability of officials in France, for "personal acts."

But State responsible for "official acts."

composed in part of judges and in part of members of the legislature. Goodnow, *Comparative Administrative Law*, Vol. II, pp. 301-302.

(a) See Dodd's *Modern Constitutions*, under respective heads.

(b) Lowell, *Governments and Parties in Continental Europe*, Vol. II, p. 220, note. Cf. sec 197 of the Code of Criminal Procedure (Act V of 1898) of India, according to which sanction of the Local Government or of the Government of India or of some authority empowered in that behalf by the said Governments or that of some officer to whom he is officially subordinate must be obtained for prosecuting a judge or a public servant removable by the said Governments.

(c) Lowell, *Government of England*, Vol. II, p. 494.

In Germany, also, civil courts will refuse to try case if act found to be "official act."

12. In Germany, too, a Government official, on being sued in the ordinary court for damages for an act alleged to be an infringement of the plaintiff's rights, may challenge the jurisdiction of the trying court on the ground that it was a *bona fide* official act. In the Imperial Government, this issue, like any other issue of jurisdiction, is decided by the trying court itself, in other Governments possessing administrative courts by the Court of Competence if there is one, otherwise by the Imperial Court at Liepsic. If the decision is against the competence of the ordinary court there is, if the act is that of a minister or of any officer of the Central Government, no legal remedy against it, for acts of ministers and officers of the Central Government in Germany are not subject to the jurisdiction of the administrative courts(a). Should the decision however be that the official concerned was guilty of a violation of the law, or of negligent action in the performance of his duties, the suit would proceed against him personally.

Remedy in ordinary courts for personal wrongs only.

In Austria.

13. The fundamental laws of Austria besides affirming the responsibility of ministers expressly provide for suits against officials for injuries done in the exercise of their office, and a special court, the Reichsgericht, presided over by judges holding office under an independent tenure, is charged with the duty of protecting rights guaranteed to the subject by the fundamental laws from infringement by officials, in cases in which the aggrieved individual has failed to obtain redress from the administrative courts. But by statutes, which it is beyond the competence of this court to question, what the Reichsgericht has to see in such cases is not whether the official, in acting as he did, went beyond his authority but only whether he had reasonable grounds for so acting. As regards the right to sue officials, the provision of the constitution in that behalf has been made useless by the law not providing any machinery to enforce their liability. The responsibility of ministers in Austria, appears by these means to be reduced to very humble dimensions, even if the provision for impeachment did not prove to be as futile as it is said to be by Mr. Lowell (b).

Limited character of relief available in administrative courts,

No civil liability of officials for personal wrongs.

Provision as to impeachment of ministers nugatory.

Similar conditions in Italy except that ordinary courts entertain administrative causes.

14. In Italy, the validity of acts of the administration is, as between the person aggrieved and the State, determined by

(a) Goodnow, Comparative Administrative Law, Vol. II, pp. 248, 258.

(b) Governments and Parties in Continental Europe, Vol. II, pp. 76-83.

ordinary and not special administrative courts, but, as in Austria, the personal liability of officials in damages for violations of the law cannot be enforced from want of legal machinery to give effect to it.

15. There are, as I have stated elsewhere, no administrative courts in Switzerland, but the Continental distinction between ordinary and administrative law is well recognised in its administrative system. In this country, any citizen is at liberty to sue a Federal official, even a Federal Councillor and a Federal Judge. The complaint, when the offender is a Federal Councillor or Judge, is brought before the Federal Assembly which can exercise jurisdiction over him as an administrative authority. If it rejects the complaint, the complainant is free to bring his action before the Federal Tribunal against the Confederation which assumes the responsibility for its functionary. To sue other officials, he must apply to the Federal Council first and then to the Federal Assembly, and if both fail to send the case to the Federal Tribunal, he can proceed before that tribunal on his own responsibility after giving security for costs. An official can, as previously indicated, be prosecuted criminally for acts done in the course of his employment only with the consent of the Federal Council or Federal Assembly (a).

Procedure in Switzerland.

Suits against officials to be preceded by appeal to administrative authority.

State assumes responsibility when suit against Federal Judge or Councillor.

Criminal responsibility.

16. The rule in England has been well stated as follows: "All ministers and servants of the Crown and public officers generally are civilly and criminally liable in their individual capacity for tortious or criminal acts (subject to certain provisions protecting judges and justices of the peace in the execution of their office, and as to public authorities generally, subject to certain statutory conditions limiting the time within which the action is to be brought), and this liability may be enforced either by means of an impeachment or by ordinary criminal and civil proceedings" (b). Further, "where the subject refuses to comply with what appears to be unjust or illegal demands made by the Crown, the ministers and servants of the latter in order to enforce

Legal responsibility of officials in England, civil and criminal.

(a) Lowell, *Governments and Parties in Continental Europe*, Vol. II, p. 220, note 1. Cf. Sec. 197 of the Criminal Procedure Code of India (Act V. of 1898).

(b) Halsbury, *Laws of England*, Vol. VI, p. 383.



State necessity no defence.

Officials no better than private individuals in English law.

"Responsibility" and not "privilege" the keynote of the law of officers in England.

"Common law" crimes of malfeasance and nonfeasance in office.

Are ministers exempt from criminal proceedings in ordinary courts?

obedience must have recourse to ordinary tribunals of justice (a). Claims made by the Crown cannot be supported by mere pretence of prerogative, since the courts have power to determine the extent and legality or otherwise of any alleged prerogative, nor may illegal acts be rendered justifiable by the plea of King's command or State necessity" (b).

17. Beyond the fact, therefore, that the possession of a particular office may clothe him with special powers which as a private individual he would not have authority to exercise—powers which may be ministerial, discretionary and even quasi-judicial—a public official, whatever his rank or station, in England, occupies the same position before courts of law as any private individual. Offices, moreover, carry duties as well as powers, and officers, by reason of these duties, become specially liable to legal proceedings for acts of malfeasance and nonfeasance in office. Responsibility and not privilege is the ruling idea which underlies the holding of office in the English system.

18. The responsibility before the law of officials (and ministers are no exceptions) is, as has been previously stated, both civil and criminal. The criminal responsibility of officers in the English system appears indeed to be wider than is strictly justifiable on doctrinal grounds, for the weakening of central administrative control over officials early in its history led to the courts evolving the somewhat artificial doctrine that "any act or omission or disobedience of official duty by one who has accepted office, when it is of public concern, is a crime" (c). The fear of punishment was the master whom the courts thus set above officials to exact due performance by them of their appointed duties. Not nonfeasance and malfeasance in respect of ministerial duties only, but even wilful and corrupt exercise of discretionary duty was declared to be a common law crime. But an exception might have been made in favour, amongst others, of ministers who, according to

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(a) This statement is not strictly accurate. See Lecture XXII *infra*, para. 13.

(b) Halsbury, *Laws of England*, Vol. VI, p. 382.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, p. 79. Bishop; *New Commentaries on the Criminal Law*, Vol. I, p. 277. Halsbury, *Laws of England*, Vol. IX, p. 486.

Dr. Bishop, were *probably* not liable to ordinary criminal process for nonfeasance or malfeasance in office (a).

19. But if ministers and other high officials are not prosecutable for common law crimes, they are on the other hand liable to impeachment not merely for crimes but for "political offences" as well. The only difference between ministers and subordinate officials in regard to criminal responsibility for wrongful performance of official duties would thus appear to be that for these offences, whilst the latter are liable to prosecution before the ordinary courts, the former can be proceeded against only by way of impeachment. For other crimes, ministers in England are liable to prosecution before ordinary courts as well as by impeachment. But, as previously stated, the fact that ministers are now dismissible by the legislature at will has made resort to the latter mode of trial unnecessary for all practical purposes.

Liability to impeachment for those and other crimes.

Impeachment made obsolete by Parliamentary responsibility of ministers.

20. As regards civil liability, the position of ministers as such does not appear to be in any way distinguishable from that of other officials. No person who enters into a contract as a servant of the Crown or as an agent for the public and treats in that capacity can be made personally liable upon such contract either directly or upon an implied warranty of authority. *Dunn v. Macdonald* (b). Nor can money which has been paid, erroneously or otherwise, by a private individual to an officer of the Crown be recovered from him as money had and received, because that is in substance a claim against the Crown, his principal, though if money has been actually paid by the Crown to its officer in trust for an individual, it may perhaps be recovered from him as money had and received (c).

Civil liability of ministers same as that of other officials.

Non-liability upon contracts concluded on behalf of Government.

Remedy when officer trustee.

21. As to liability for tort, a minister like any other public official may be sued and made personally liable for tortious

For nonfeasance and misfeasance in office.

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(a) Bishop, *New Commentaries on the Criminal Law*, Vol. I, p. 279. Dr. Bishop states this on the authority of Blackstone and another writer. I have not found this statement of the law anywhere else.

(b) (1897) 1 Q. B. 401, 555 C.A. Halsbury, *Laws of England*, Vol. VI, p. 314. A person making a contract with another on behalf of an alleged principal but without the latter's authority would under the English law be ordinarily liable upon his warranty of authority to the other party to the contract. On this point the law therefore operates differently in the case of unauthorised contracts on behalf of the Crown.

(c) Halsbury, *Laws of England*, Vol. VI, p. 315.

acts committed by him in his official capacity without showing malice or want of probable cause, and State necessity or the order of the Crown or a superior officer cannot be pleaded in defence (a). A liability to compensate a private individual as for a tort may arise, if injury is caused to him by an official committing a breach of duty which amounts to misfeasance, and even for nonfeasance, if the law has cast upon him the specific duty, to the plaintiff or to the class of persons of which the plaintiff is one, to perform the act omitted (b).

Officers if  
may be sued  
in their  
"official  
capacity"?

Except under  
statute.

22. In English text-books on constitutional law, one frequently finds it stated that no action at common law is maintainable against officers or servants of the Crown *in their official capacity* either in contract or in tort (c). English law does not recognise in officials a double personality, an official Hyde separate from and independent of the personal Jekyll, and it is as a private individual only that, in the absence of provisions made by statute, an action can be brought against him (d). But by statute, a particular official or an office may be invested with a quasi-corporate capacity to sue and be sued, the Secretary of State for India in Council being a notable instance (e). Stripped of all disguises, this is plainly a device to enable the Crown to be sued for certain purposes as a private persons under a fictitious name. When, however, the office has not been incorporated, the only course left to the aggrieved subject is to prefer a petition of right to the Crown,

(a) Halsbury, *Laws of England*, Vol. VI, p. 415.

(b) *Ibid*, p. 413.

(c) *Ibid* p. 413.

(d) There is an apparent exception to this in the practice which permits suits in equity to be brought against the Attorney General as representing the Crown for reliefs which do not seek directly to affect the estate of the Crown but touch its interests only indirectly. It cannot be utilised to recover property or money claims, and still less compensation from the Crown for which one must proceed if at all by petition of right. But it should enable the subject to compel government officials and departments charged with the performance of duties which bring them into conflict with private interests to act in accordance with law. This matter will be considered under the topic, "Judicial Control of the Administration. See *Dyson v. Atty. General*, (1911) 1. K. B. 410 at p. 421 and *The Eastern Trust Co. v. Mc Kenzie Mann & Co, Ltd.*, (1915) A. C. 750 : 20 C. W. N. 457. The matter will come up for direct treatment under the topic, "Judicial Control of the Administration," Lecturo XXIII *infra*, para 27.

(e) For other instances, see Halsbury, *Laws of England*, Vol. VI, p. 414 .

which, as has been explained before, does not under the English law lie in cases of torts. Relief against the Crown for a tort cannot obviously be obtained by the indirect process of suing a servant of the Crown in his "official capacity," and the public revenues cannot be reached in a case in which a petition of right lies, and still less in cases in which it does not lie, by an action in such a form. This, it seems to me, is the true *ratio* of *Gidley v. Palmerston* (a), *Raleigh v. Goschen* (b) and *Palmer v. Hutchinson* (c), cases which like *Buron v. Denman* (c) are easily misunderstood.

23. A minister or a head of a department (unless incorporated as above) is not liable for the acts of his subordinates unless directly ordered by him in such a way as to make them his own acts, *Raleigh v. Goschen* (d), *Mersey Docks Trustees v. Gibbs* (e), for the subordinate is a servant not of his superior officer but is, equally with the latter, a servant of the Crown. Where, however, the act complained of is one of mere non-feasance in respect of a duty which the law has specially cast upon him, the fact that he has entrusted the duty to a person who has neglected it furnishes no excuse for an omission on his part (f).

Superior officer not liable for tort of subordinate.

Exceptions.

24. Having reviewed the law in England as to the responsibility of ministers from all points of view, I am unable to accept as a correct representation of it the statement of Mr. Todd that "in assuming on behalf of the Crown a personal responsibility for all acts of the Government, ministers are privileged to share with the Crown a personal immunity from vexatious proceedings, by ordinary process of law, for alleged acts of oppression or illegality in the discharge of their official acts, and that whether the alleged liability arises out of contract or out of tort or from any matter of private individual complaint against a minister of the Crown, for acts done in his official capacity the ordinary tribunals of justice will afford him special immunity and protection" (g). High officers of

Mr. Todd's statement of ministerial irresponsibility examined.

(a) 3 Brod. and Bing. 275 (1822).

(b) (1898) 1 Ch. 73.

(c) 6 App. Cas. 619. (1881).

(d) 2 Exch. 167 (1848).

(e) L. R. 1 H. L. 93 (1866).

(f) Halsbury, Laws of England, Vol. XXIII, p. 321.

(g) Todd, Parliamentary Government, 2nd Edn., Vol. I, pp. 494-495.

Government entrusted with responsible discretionary duties are, according to Dr. Bishop, *probably* not liable to ordinary criminal process for conduct in office however corrupt (a), though they are answerable in impeachment for every species of official misconduct. I am not sure that this surmise of Dr. Bishop's has not reference only to the law of America. But granting that it is true with reference also to the law of England, it does not go as far as Mr. Todd's statement which would grant immunity to ministers in respect of civil as well as criminal proceedings before the ordinary courts of law. If now, it be remembered that there are in the English system no special courts or procedure to enforce the civil liability of ministers, and that trial by impeachment, the only remedy available for official crimes committed by them, is for all practical purposes obsolete, the statement of Mr. Todd, if correct, would mean the total extinction of the doctrine of ministerial responsibility, the cornerstone of the English constitutional system. Mr. Todd may well have been misled into the above opinion by the paucity of instances in which ministers have in fact been sued for breaches of official duty in courts of law, and by the almost total absence in recent times of reported cases in which a minister has been sued successfully. The truth is that the discretionary authority of ministers and heads of departments is so large that the occasions on which their acts may need to be challenged on the ground of want of competence (normally the only ground on which their acts may be questioned) must necessarily be very few. Moreover, the constant surveillance which Parliament exercises over them acts as a powerful deterrent against the overstepping by ministers of the bounds as well of law as of reasonableness. So far from the English courts being ready to afford ministers special immunity and protection in respect of acts done in their official capacity, courts are not, in the absence of compelling reasons, easily persuaded that the discretion conferred by law upon a public official was intended to be arbitrary, and do not in ordinary cases hesitate to cast him in damages if an exercise of official discretion appears to have been attended by fraud, collusion, ill-will or malice. If the discretion to be exercised was quasi-judicial, the decision of the official would be upset if it was arrived at in disregard of rules of natural

Why instances of actions against ministers so rare.

English courts ready to interfere with corrupt exercise of even discretionary powers.

(a) Bishop, *New Commentaries on the Criminal Law*, Vol. I, p. 279.

justice, as for instance, if the official was shown to have been personally interested in the matter or if the decision was rendered without giving the parties a reasonable hearing (a). I do not find that upon these points, the acts of ministers receive any exceptional treatment at the hand of English judges.

25. If ministers and high officials in England had, in fact, been habitually subjected to harassing litigation of a frivolous and vexatious character, there would be reason for demanding some restriction (in respect it may be of court as also of procedure) in regard to the trial of complaints against all such officials. But there is no cause for apprehending that any such restriction will ever be necessary. If, however, this should be found necessary, I would not be surprised to see the old Roman law principle of suing high officials with the consent of the Sovereign previously obtained, revived, with only this modification that the consent to be taken will be the consent of the Sovereign legislature and not of the Chief Executive. This appears indeed to be the view which has commended itself to the people of France and the United States, at least in regard to criminal proceedings which in both countries can apparently be brought only by way of impeachment (b). But in regard to civil liability I do not find that the law either in England or in the United States grants any special immunity to ministers and heads of departments as such, Mr. Goodnow's opinion to the contrary notwithstanding (c). If the English doctrine of ministerial responsibility had in fact been as unreal as Messrs. Todd and Goodnow's interpretation of it would make it out to be, it is not easy to understand why it should have been taken

English principle of unrestricted legal responsibility does not lead to vexatious actions.

If it did, leave of legislature would probably be made necessary for initiating action.

Criminal proceedings against ministers in France and the United States only by way of impeachment.

(a) Halsbury, *Laws of England*, Vol. XXVII, pp. 355—356.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, p. 80.

(c) *Ibid.*, Vol. II, pp. 164—165. The true position of heads of departments in the American Government seems to be this: The heads of departments are the agents of the President in the performance of his political and discretionary functions, and in regard to other matters they are responsible to the President and cannot be controlled or coerced by Congress or the courts any more than the President himself. The immunity they enjoy in relation to political or other matters in which they are invested with discretion is due to the fact that in such relations they act within their legal powers which are of the widest. It does not mean that the heads of the departments in America share in the President's irresponsibility. See Black's *Constitutional Law*, paras. 66 and 73.

over and made the foundation of constitutionalism by political reformers on the Continent of Europe and in Latin America.

No remedy in England in cases of erroneous exercise in good faith of official discretion.

Such remedy available through administrative courts on the Continent.

English system nevertheless superior.

It secures strict adherence to law by officials.

And keeps down officials' arrogance.

26. But if on this point of the responsibility of ministers the administrative system of England has served as the model for all modern constitutions, there are others, in respect of which English constitutionalists may well profit by borrowing from the systems in force on the Continent. An erroneous exercise of official discretion in good faith cannot be corrected by any tribunal in England and yet when a discretion is given to an official the intention is that it should, by preference, be exercised correctly. The administrative courts on the Continent where they exist afford this necessary corrective to a blundering but not malicious exercise of official discretion. The fact moreover that suits taken to administrative courts are tried as between the State and the complaining subject undoubtedly enables those Courts to give more adequate pecuniary compensation than is possible in England where the offending official (and not the State) can be made to pay it. But even so, the scales do not appear to turn decisively in favour of the Continental system.

27. Though no doubt the English system gives a less effective pecuniary redress to the sufferer when the law has been broken, it does on the other hand secure a stricter adherence to the law by the officials so that fewer occasions arise for appealing to courts of law for such redress. The circumstances which lead to this result are summed up by Mr. Lowell as follows:—(1) Judges of ordinary Courts adhere more strictly to legal rules; (2) there are, under English law no question of high State policy in which Government has a free hand apart from the control of the court; (3) the direct remedy against the official though less remunerative to the complainant is more sure to hold him within the limits of his authority than the ultimate right of redress against the State either by way of damages or by the annulment of an illegal order (a). It is this personal liability of officials in England, says Hatschek truly, that prevents every policeman or tax-collector (not to speak of a minister) from imagining himself an

incarnation of the idea of the State—in itself a no small gain (a).

28. It is not necessary to consider the law of the United States on the legal position of departmental chiefs either in the Federal or in the State Governments, as (except for slight differences already incidentally noticed) it is substantially identical with the English law. The legal position of Executive Councillors in India, the only authorities at all corresponding to ministers, I have already considered in a previous lecture (b).

Responsibility of officials in the United States.

29. Excepting the Lord Chancellor of England, to slay whom is still high treason under a statute of Edward III which the English Parliament has not yet found time to amend or bring up to date, ministers do not appear in any country to enjoy the protection of special rules of criminal law not applicable to officials in general. As colleagues of the Governor General and Governors, members of Executive Councils in India share with them the protection of sec. 124 of the Indian Penal Code, under which assaulting or wrongfully restraining them or attempting so to do, with the object thereby to induce them to exercise or refrain from exercising their lawful powers in any manner, is punishable with imprisonment for a term which may extend to seven years and fine.

High officials how far specially protected by law of crimes.

30. From the above discussion, does it appear that ministers and heads of departments are a class apart, occupying a legal position which separates and removes them from officials in general? I must say, no. The difference, which makes them so prominent in the public eye, is really due to the character and contents of the powers which belong to them. Between them the ministers exercise the whole authority of Government, discretionary and otherwise. They do not, like judges and legislators, constitute among officials a

Ministers and high officials do not constitute a separate status.

Yet require separate treatment on account of their importance and to illustrate the doctrine of ministerial responsibility.

(a)<sup>2</sup> Hatschek in *Englisches Staatsrecht*, I. 93, quoted in Lowell's Government of England, Vol. II, p. 502.

(b) In the Reform scheme outlined in the report of Mr. Montague and Lord Chelmsford, it is proposed to hand over certain departments of the Provincial Governments to ministers who will be responsible not to the Government of India or the Secretary of State but to representative local legislatures. Their legal position will presumably not differ from that of ministers in England and the Self-governing colonies.



Present lecture covers cases of officers generally to a considerable extent.

status by themselves. It is thus their importance rather than any distinctive position they may be supposed to hold in law that has induced me to make them the text of a separate lecture. They demanded a separate treatment if only to give point to the expression familiar in modern constitutional law: "the responsibility of ministers". Much, however, of what has been said regarding them apply to officers generally; and I have, in fact, taken pains not to leave in doubt which of the statements in the lecture are and which are not of general application. My next lecture on the legal position of officers generally, will thus be largely supplementary, filling up, as it will do, omissions necessarily left in a treatment directed chiefly to some very prominent members of that body.

## LECTURE XVIII. OF OFFICERS GENERALLY.

Legal relations of officers (i) towards their employers, (ii) towards the public.

1. The legal relations of officials in general may be of two kinds:—(i) Their relations with their employers who may be either the Government or some subordinate public corporation; (ii) their relations with the general public. It is the former which constitute what may be called the official relationship. In proceeding to deal with the official relationship, the first question which demands consideration is whether this relationship is necessarily one governed by law.

**I**  
The official relationship. Its nature.

Naturally extra-legal in personal monarchies.

(i) in the Roman Empire.

(ii) In the Merovingian monarchy.

2. There is no inherent difficulty in conceiving of that relationship as being entirely extra-legal. In fact, in States governed by personal rulers, officials must normally hold office by favour of the monarch and at his will, and in such States a legal official tenure can come into existence only by the operation of forces of exceptional character. I have elsewhere indicated how the Roman Civil Service, at an early stage of the Principate, came to be composed almost entirely of slaves and freedmen, and to the last, members of that service continued to be regarded as the personal servants of the Emperor, who did not hold under any legal tenure (a). Of the Merovingian

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(a) Mattingly, *The Imperial Civil Service of Rome*, pp. 28 38, 85-89, 106-98, 118-119, 123.

officer, it is said (a) that he was considered as a servant of the Sovereign. He was a part of the "Ministerium" of the King and sometimes a simple freedman ; and in the latest statement of the law of England on the tenure of offices (b), it is recorded that "except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointment at the pleasure of the Crown, and all, in general, are subject to dismissal at any time without cause assigned, nor will an action for wrongful dismissal be entertained." It appears however that "where the office is one conferred by letters patent, procedure by *scire facias*, criminal information or impeachment may be necessary in order to vacate the office" (c)—in other words, that these appointees of the Crown hold, by way of exception to the general rule, under a legal tenure. This general rule receives further elucidation from the statement that "military, naval and civil officers of the Crown being dismissible at will, no petition of right even can be brought by them to recover pay, pension or other sums to which they claim to be entitled for their services or damages in respect of their dismissal." "Neither," it is added, "have they any right of action for breach of an implied warranty against the officers who engaged them" (d). In short, the official relationship is not regarded in English law as one of contract, and, except in so far as it may be made so by statute, it is not a legal relationship. It follows, therefore, that statutory provisions apart and leaving out offices created by letters patent, the legal position of Government servants in England shows no advance beyond that of the officials of Imperial Rome and of the Merovingian monarchs of France.

(iii) In England.

3. The force which in Western Europe had been most potent in conferring legal tenure on holders of public offices was Feudalism. Between 614 A. D. to 877 A.D., that is to say, in less than 300 years, 'benefices' had been converted into 'fiefs,' and all public functions had come to be viewed as held by a tenure for life. The King himself came to regard public offices as his property the same as his other possessions and as

Official tenure tend to become legal in Feudal Governments.

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- (a) Brissaud, History of French Public Law, pp. 83-89.
  - (b) Halsbury, Laws of England, Vol. VII. p. 22.
  - (c) *Ibid*, Vol. VII, p. 22.
  - (d) *Ibid*, Vol. XV, p. 29.

Hereditary  
and purchase-  
able offices  
in France.

Later distinc-  
tion between  
purchaseable  
and non-pur-  
chaseable  
offices due to  
monarchic  
influence.

Officials un-  
der Napoleon  
removeable.

Sale of offices  
made a crime  
in England.

a fit subject for grant by Royal letters patent. Owing to the early centralisation of the Royal power in England, this process of feudalisation of offices did not make much progress in England (a) but that it did make some is apparent from the qualified legal tenure secured by holders of offices under letters patent. In Western Europe, however, the tendency of all public offices was, for long centuries, towards becoming hereditary and purchaseable. A time however came when in the interest of the growing power of the monarchy, the current had to be reversed, and "public functions, at first a fief, then an office, finally became a commission" (b). But the new policy could work itself out only slowly and imperfectly ; for between it and the ever-growing demands of the Royal treasury, a distinction came to be made between purchaseable and non-purchaseable offices. Within the former group fell financial and judicial offices which, as I have previously explained, thereby tended to become (except for cause) irremovable offices." "The offices of the Crown" ( High Constable, Chancellor, First President of the Parliament etc.), offices of the King's Household (Councillors, Secretaries of State and Secretaries to the King), military offices and commissions in general remained outside commerce. The Revolution swept away venal offices along with other Feudal institutions from off the face of France. In the reconstituted monarchy of Napoleon, officials held on removeable tenures, a position which has remained unaltered through successive changes of Government since that time. In consonance with the same spirit, an English statute of 1809 made it a misdemeanour to sell, purchase or bargain for any office or employment in the gift of the Crown, to receive or pay money for or solicit or obtain any such office or make any negotiation or pretended negotiation relating thereto or to open or advertise houses for transacting business relating to vacancies in offices in any public department (c).

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(a) Offices concerning justice and revenue were made non-saleable in England so early as St. 5 and 6 Ed. IV c. 16. Grants of offices for the benefit of incompetent persons were considered void by Coke ( Coke, Littleton, para 368 ), according to whom it is a condition of law that all offices concerning the commonwealth be lawfully kept, *Ibid.* 378. It was held in *Reynel's case*, 9 Coke Rep. 59a ( 1611 ) that a judicial office was not grantable for years since otherwise it might vest in an executor,

(b) Brissaud, History of French Public Law, pp. 388-9.

(c) Halsbury, Laws of England, Vol. IX, p. 486. Traffic in offices is not

4. Kings and members of Houses of Peers (where these survive) are practically the only persons in Europe who at the present day may be said to hold hereditary offices. Hereditary offices appear to have been a fairly common institution in India but even here they are to-day very nearly things of the past. The supreme act of self-renunciation by which the Feudal chiefs of Japan laid down their hereditary powers and privileges at the call of their country is too well-known to need repetition.

The passing of hereditary offices.

5. The Feudal tenure of office, though now a thing of the past, has left its deepest imprint on Modern Germany, where all offices are generally held on a good behaviour tenure and an office held at the pleasure of the Government is a rare exception. Discharge from office can take place in that country only as the result of a conviction by a criminal or a disciplinary court of the commission of a crime or violation of official duty. If public interest should demand the removal of an official for other than cause established in a criminal or disciplinary court, he can only be retired with a substantial portion of his salary, and except for the fact that he does not perform official duties he remains subject to the duties and in enjoyment of the privileges of office (a). It is also owing to Feudal influences that offices in England, though legally held at the Crown's pleasure, are in practice treated as life-offices not terminable except for good cause (b).

Legal tenure of officials in Germany a relic of Feudalism.

Traces of Feudalism in English practice though not in English Law.

6. If it be natural for official relationship in personal monarchies to assume an extra-legal character, it is equally natural for the same relationship, when power passes from a personal ruler to an assembly, to find expression in legal rules. In both Greece and Republican Rome, tenures of offices were for terms fixed by the constitution. Elective offices in all modern States are almost invariably for terms, and a person

Tendency of official tenure to be legal in Republican Governments

(1) In Greece and Republican Rome.

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made a criminal offence in India ; but sec. 6, cls. (f) and (g), of the Transfer of Property Act ( IV of 1882 ) makes a public office, the salary of a public officer whether before or after it has become payable, stipends allowed to military and civil pensioners of Government and political pensions non-transferable. Sec. 60 of the Civil Procedure Code ( Act V of 1908 ), as will be pointed out later on, imposes restrictions upon the involuntary alienation of salaries and pensions.

(a) Goodnow, *Comparative Administrative Law*, Vol. I, p. 94.

(b) Halsbury, *Laws of England*, Vol. VII, p. 81.

(ii) In England.

elected to an office has not only a right to the office but he has normally the right to continue in office till the expiration of the period fixed by law, unless some causes of disqualification should have supervened in the meanwhile. Also, when the supreme control has passed from a personal ruler to a legislative assembly, the latter in creating new offices and regulating old ones may assume authority to fix the nature of the incumbent's tenure as well when the incumbent is to owe his appointment to executive nomination as when his appointment is made to depend on popular election. Thus several offices in England, e. g. those of judges of the superior courts, of the Comptroller and Auditor General, and Assistant Auditor, amongst others, are expressly directed by statute to be held during good behaviour, subject to the power of removal upon an address of both Houses of Parliament. Such offices may, it is said, be determined for want of good behaviour without an address to the Crown, either by *scire facias* (in the case of offices held under letters patents), criminal information or impeachment or by the exercise of the inquisitorial and judicial jurisdiction vested in the House of Lords. Misbehaviour includes, besides improper exercise of the functions appertaining to the office or non-attendance or neglect or refusal to perform the duties of the office, any infamous offence of such a nature as to render the person unfit to exercise the office, though not committed in connection with the office (a).

Why general rule of removeable tenure still retained in England.

7. It is remarkable that in England where supreme power has passed altogether from the King to the Parliament, the bulk of public offices should still be wanting in a legal tenure, and it is still more remarkable that the Feudal notion of a vested right in all offices which never found a place in her laws should yet govern the practice of her Government and her public bodies in their dealings with their officials. The explanation is to be found in the aristocratic composition of the Parliament which took over the powers of the King in order that the same might be exercised by a committee of its own members. The squires who sat in the Commons' House meant in real earnest to rule the Kingdom. They had no intention of allowing the prerogative powers of the Crown to fall into abeyance. They showed no disposition to cut down or qualify

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(a) Halsbury, Laws of England, Vol. VII, p. 22.

the absolute control which the King wielded over his servants.

8. In point of fact they went on exercising Royal powers in the name of the King, and the relations of the Crown and its servants remained *in law* the same as it was in the days of the Tudors and the Stuarts. In practice, however, as I have said before, public officers in England have come to hold their offices on what amounts to a good behaviour tenure, though the fact that in law they are dismissible at pleasure enables Parliament always to hold its power of removal *in terrorem* over almost the entire civil and military services, which thus are made to feel that they are the servants and not the masters of the Government.

Power to dismiss rarely exercised in practice but retained in law for the control of the Civil Service.

9. Not the law, but the practice as to official tenure appears to have undergone a "sea-change" in passing from England to the United States. On the establishment of Republican forms of Government in the Colonies and the Union, the consequent abolition of the hereditary Chief Executive and substitution therefor of individuals holding the office for short terms only, the traditional notion of continuity in office was completely upset. One result of this change was that there was in the body politic no permanent institution like the Crown in England endowed with the residuary powers of Government which were now assumed to have vested in the legislatures—bodies which themselves were liable to changes in their personnel and political complexion quite as frequently as the Executive Government. It would have been surprising if in the circumstance these legislatures had not felt themselves justified in imposing short elective terms on all the important offices under Government, with power in the incumbents so elected to appoint the rest, so that the entire administration should in this way always reflect public opinion through selection by the people or by officials elected by them of all public officers, from the heads of the executive and legislators to post-office employees and town-constables (a).

(iii) Official tenure in America.

Origin of the "spoils system."

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(a) How about the same time a similar notion captured the fancy of the Constituent Assembly in Revolutionary France, at least in the matter of filling judicial appointments, I have already noticed in my lecture on the Legal Relations of Judicial Officers, *supra*, Lecture XVI, para 9.—See also Brissaud, *History of French Public Law*, p. 561.

10. The idea of "rotation in office," that is to say, of filling all offices at the disposal of the authorities by the party in power could not have taken firm root in American politics, if, at the bottom of it, it had not accorded with the democratic spirit of the times, and I find it difficult to agree with the suggestion countenanced by Mr. Goodnow that the "Spoils Act" of 1820, which expressly affirmed that the Federal officers mentioned in the Act were to be appointed for fixed terms and be removeable at pleasure, was passed through partisan political motives (a). The principle rapidly extended to almost all the offices in the National Government and from thence into the administrative systems of most of the States, so that "now," says Goodnow, "the term of almost every administrative office in the United States is fixed by law at a certain number of years, generally four," and further, that "it is generally expected that a new administration will not reappoint the old incumbents". It may be safely stated that a national institution does not, at least in a democratic country, grow altogether from unworthy motives. It is a fact, however, that the institution has since been turned to such ignoble uses by party bosses and wirepullers and has for that reason proved a source of such unmixed evil that no one has a word to say in its favour at the present day (b). The evil is now being sought to be alleviated by the introduction of competitive examinations for filling appointments, which by taking away the incentive to removals for the purpose of creating a vacancy

Now generally condemned and sought to be eradicated.

(a) To a modern observer, the spoils system of filling public offices may appear to be less unreasonable than at any rate the system of filling them by lot—the system which became prevalent in the best days of the Athenian republic. The drawing of lots for filling public offices was however in essence an assertion of the equality of all citizens, that is to say, of their equal fitness for rule—citizenship as understood in Athens being the capacity of being ruler and ruled in turn. Its use, Mr. Greenidge correctly points out, was in the highest and purest sense democratic. The possession of the requisite qualification for performing the duties of the office was secured by the examination of the candidates *after* selection. See Greenidge, *Outlines of Greek Constitutional History*, p. 139. Mr. R.L. Ashley, I find, holds short terms and rotation in office to have been "not only legitimate but the necessary product of democracy." *The American Federal State*, p. 143.

Appointment by lot in Athens.

(b) For a reasoned exposition of the abuses of the system of "rotation in office", see Mr. Elihu Root's "Addresses on Government and Citizenship" pp. 48 to 57. In one country at any rate, the abuses of the spoils system have led to a revolution. See Ogg's *Governments of Europe*, Title, Portugal.

for a patronage appointment has, in the Federal Government at any rate, effected a great reduction in the number of purely political dismissals (a).

11. What then is the real character of the official relationship to-day? It differs in details in different countries. But everywhere it connotes a relationship which is not based on contract. The terms "public office" and "public officer" have been differently defined in different contexts in English, American and Indian law (b). Mr. Goodnow, basing his analysis on American decisions, says, an office can never be created by contract, but finds its source and its limitation in some act of governmental power. The conception of office does not according to him depend in any way upon the character of the duties performed. It makes no difference whether these duties carry with them the power of compulsion or not or whether or not the holder of the office is permanently occupied in the discharge of his duties or whether or not the duties are discretionary. It may or may not be a paid office. "All that seems to be necessary is that the duties of the office be discharged in the interest of Government, and that the right to discharge them be based on some provision of law and not upon a contract" (c). To put the matter more concisely, the official relationship is not one of contract but of status. The rights, privileges and duties attaching to an office are even to this day determined mainly by law and not by agreement. For all that, however, there is nothing to prevent a Government from entering into special "covenants" with its officials, and in so far as there may be an agreement defining the rights and obligations of the parties to such a relationship, I see no insuperable difficulty in viewing that agreement as one capable of enforcement. In *Shenton v.*

Real nature  
of official rela-  
tionship.

Not one of  
contract but  
of status.

Is it modifi-  
able by con-  
tract?

(a) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 91-92. Fairlie, *American National Administration*, pp. 252-257.

(b) For an English definition, see per Best, C. J., in *Henly v. Lyne Corporation*, 5 Bing, 91 (1828), at p. 107. Many American decisions turn upon the interpretation of Art. 2, sec. 4. of the Federal constitution, which provides for the impeachment of civil officers. The definition of a "public servant" in sec. 21 of the Indian Penal Code is in appearance an enumeration of instances and has not been fruitful of real definitions in the hands of judges.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 3-4.



Not in Eng-  
land.

*Smith* (a), the Judicial Committee of the Privy Council went indeed so far in this direction as to hold that the right of the Crown to dismiss officials at pleasure did not exist by virtue of any special prerogative, but only as an implied term in what may be regarded as the contract of official employment. But the Court of Appeal in *Dunn v. Queen* (b) repudiated this opinion and held that even when the contract is for employment for a term, it must be held to have imported into it a condition that the Crown can dismiss the officer at pleasure. Considerations of courtesy only appear to have prevented the court in that case from adopting the language of Sir Robert Finlay's contention that the Crown *was not competent* to tie its hands by such a contract, but they said what amounted to much the same thing, viz. : that any authority representing the Crown who professed to exclude the power by express stipulation would be acting in violation of the public policy of the country and acting in derogation of the power of the Crown. Previously in *Mitchell v. Queen* (c), it had been broadly laid down that "no engagement made by the Crown with any of its military or naval officers in respect of services either present, past or future could be enforced in any court of law.

Claim for  
arrears of pay  
and pension  
if legally  
maintainable  
in England.

12. But even if it should be impossible to view the official relationship otherwise than as a matter of status, it is difficult to see why this law of status should in the English system continue to deprive officials holding "at pleasure" of the remedy by petition of right in respect of claims for arrears of pay and pension already earned or other ascertained sums which are not claimed as damages for a tort. Such a state of things could hardly have been tolerated at the present day, if the law had not been greatly modified in practice. As I have previously pointed out official position is in practice regarded in England as implying a vested right, and officials in that country do in fact enjoy all such rights, privileges and protections as would appear to follow from their possessing a vested right in their offices and the emoluments attached thereto,

(a) (1895) A. C. 229.

(b) (1896) 1. Q. B. 116.

(c) (1896) 1 Q. B. 121 n. (1890).

a right defeasible ordinarily only upon misconduct or other grave cause (a).

13. Summarising the law on the conditions of tenure of public servants in England, Sir William Anson says (b): All offices, whether limited as to tenure by a specified term or not so limited, are subject to one of two conditions. They are held either 'at pleasure' or 'during good behaviour' and unless it is otherwise stated their occupants hold at pleasure. The rule is equally applicable to civil and to military appointments. Whether appointed directly by the Crown or by heads of departments, all hold on the one or the other condition, the Royal pleasure or good behaviour. Appointments made during good behaviour create a life interest in the office unless specifically made for a term of years. Good behaviour means good behaviour in respect of the office held. Misbehaviour appears to mean misconduct in the performance of official duties, refusal or deliberate neglect to attend to them, or it would seem conviction for such an offence as would make the convicted person unfit to hold a public office. Where an office is thus forfeited by breach of the condition of tenure, the mode of removal does not, according to Anson, seem perfectly clear. A public servant not holding at Royal pleasure may presumably, on being wrongfully ejected, proceed for his salary in the form of a petition of right or by writ of *quo warranto* against the person who had replaced him in office.

The law of official tenure in England summarised.

14. The English law of status which governs the official relationship has been worked out in the completest manner by the courts of the United States. The right of an official to compensation for services rendered is not, it is said, a contractual right, since the official relation is not a contractual relation. "If the right to compensation exists at all, it exists as the result, not of any contract, or by virtue of any service rendered to the Government, but because the law has attached a compensation to the office" (c). But in order that there should be a right at all the law must not only attach a compensation

The law of official tenure in the United States.

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(a) Lowell, Government of England, Vol. I, p. 153.

(b) Anson, Law and Custom of the Constitution, Third Edn., Vol. II, Part I, pp. 221-224

(c) Goodnow, Principles of the Administrative Law of the United States, p. 286.

to the office, it must also permit him to sue the Government for it, the general rule in America, as in England, being that Government cannot be sued in its own or in fact in any court without its consent. From the non-contractual character of the right to compensation, it follows that "the compensation, however it may be fixed, may be changed by the authority fixing it, provided no higher law, such as the constitution when it is fixed by statute, or a statute when it is fixed by the administration, prevents," and that if it is altered, diminished or altogether terminated during the term of office of the incumbent, such change will not be regarded as impairing the obligation of a contract, since the official relation is not a contractual one (a). Inconsistently, however, with these general principles, it has been held in *Fiske v. Police Jury* (b) and *Stewart v. Police Jury* (c) that where official services have been rendered, a contract to pay for them at the rate fixed by law is implied, which cannot be impaired even by the legislature; and officers have been held to possess the right to enforce the payment to them of all the expenses which they have been obliged to incur in order to discharge their duties. *Powell v. Newburgh* (d) *United States v. Flanders* (e). With stricter regard for logic than justice, however, the courts of the United States hold that a claim to pension is no more of a contractual character than a claim to salary, and a pension may be changed at any time even after the right to it has vested where authority to make the change has been granted by the legislature (f).

15. The point of view which regards the official relation as wholly non-contractual, if strictly enforced, may work much hardship, but it is by no means without its compensating advantages. The official relation not being a contractual relation, the incumbent does not lose his right to his compensation (when he has it given to him by law) by reason of his

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(a) Under Art. 1, sec. 10 of the United States constitution, any law impairing the obligation of contract is unconstitutional.

(b) 116 U. S. 131.

(c) 116 U. S. 135.

(d) 19, Johnson, N. Y. 285.

(e) 112 U. S. 88.

(f) Goodnow, *Principles of the Administrative Law of the United States*, pp. 286-292.

inability (as for example from sickness) to discharge the duties of the office. So long as he holds the office, he has the right to his compensation, and if an officer is illegally prevented by his superiors from discharging his duties, as by an unauthorized removal, he does not lose his claim to his compensation (a).

16. Under both English and American law, officers in the employ of local or other corporations have rights of action against their employers arising, it may be, from a valid contract or from some provision of their charter or statute of incorporation. An officer employed by a corporation may of course by the term of his employment or by the law or charter of its incorporation be liable to dismissal at the pleasure of his employer, or for cause, or on the expiry of a fixed term. But no corporation can refuse to pay salary already earned, whilst all corporations must, like any private employer, indemnify their servants for losses incurred in the lawful discharge of their functions. Unlike Government again, corporations can be sued in tort for damages by their employees as by any other person. It is difficult indeed to see why the same conditions should not govern appointments to offices under the control of Government. The very devious reasonings by which courts in the United States have managed to give relief to men who have already earned their salary against deprivation by *ex post facto* legislation and to indemnify officers for expenses lawfully incurred by them in the performance of their official duties demonstrate that the present view of American and English law in regard to the official relationship stands in need of revision (b).

Tenure of corporate offices.

Contrasted with tenure of offices under Government.

17. The relations of a municipal corporation to its employees will be governed in the first place by provisions in that behalf in the charter of incorporation where there is one

The law of tenure of corporate offices.

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(a) Goodnow, Principles of the Administrative law of the United States, p. 288.

(b) The English law has come only gradually to see the unwisdom of the State refusing to honour its debts. The right to repudiate all public debts could no doubt be plausibly justified on the ground of public policy, as providing the only effective guarantee against public officers improvidently contracting debts on behalf of Government. But if honesty has at last justified itself as the better policy in Government's dealings with its creditors, it may do so yet in its dealings with its servants, *Dunn v. Queen* (1896) 1 Q. B. 116 and *Mitchell v. Queen* (1896) 1 Q. B. 121 n. (1890) notwithstanding.

or by the general or special statute of incorporation in which it originated. But it has been held in England by Lopes, J., in *Booth v. Arnold* (a) that such corporations have the common law right of all corporations to amove their members and officers. A public corporation can thus remove at will an officer whom it has expressly appointed to hold such office at the will of the corporation. In all other cases, corporate officers can be removed only by a formal proceeding for amotion which of course can be legally taken upon the happening of circumstances entailing forfeiture of office. Causes of amotion are : (1) offences of an infamous character indictable at common law, and (2) breaches of conditions expressly or tacitly annexed to the appointment. A corporate officer cannot as a rule be removed without being heard in defence or at least without previous notice of intention to remove him ; and, unless there is a clear direction to the contrary in the charter of incorporation a freehold office within a corporation is not determined during the life of the holder without some formal act, such as amotion and such person is entitled to be summoned before he is removed. Such an officer may also be suspended ; and a mere irregularity in procedure is immaterial, if there exists good cause for suspension. In amotion orders made by local corporations, appeals lie to the superior courts as visitors. An information in the nature of a *quo warranto* will lie for usurping an office under a local corporation provided that it be of a public nature and a substantive office and not merely the function or employment of a deputy or servant held at the will of others (b).

The law of  
official tenure  
in the British  
Colonies.

18. In *Shenton v. Smith* (c) previously cited, it was held by the Judicial Committee of the Privy Council that Colonial Governments stood on the same footing as the Home Government as to the employment and dismissal of servants of the Crown, and that in a contract for service under the Crown, except in circumstances where it is otherwise provided by law, there is imported into the contract a condition that the Crown has the power to dismiss at pleasure. In *Gould v. Stuart* (d),

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(a) (1895) 1 Q. B. 571.

(b) Halsbury, *Laws of England*, Vol. VIII, pp. 330-331 ; Adler, *Law of Corporations*, pp. 46-48.

(c) (1895) A. C. 229.

(d) (1896) A. C. 575.

in which this proposition was reaffirmed, it was found that the New South Wales Civil Service Act of 1884 had made provisions for the protection of officials which were inconsistent with the importing into the contract of service of a term that the Crown might put an end to it at pleasure. This decision led to the New South Wales legislature promptly recanting the policy of the Civil Service Act of 1884, and the New South Wales statute, 59 Vict. c. 25, sec. 28, expressly reserved the right of the Crown to dispense with the services of any person employed in the public service of the colony irrespective of the provisions of the Civil Service Act of 1884 and other enactments of that description (a). In *Young v. Waller* (b), the Privy Council held that although the New South Wales Civil Service Act of 1884 temporarily deprived the Crown of its right to dismiss its civil servants summarily without following the provisions prescribed therein, yet it did not take away the right of the Crown to abolish a civil office and such abolition did not entitle the official to sue for compensation as for a breach of contract. In *Dunn v. Queen* (c) previously cited, Sir Claude Macdonald, then Commissioner and Consul General for the Niger Protectorate in Africa, acting on behalf of the Crown, had engaged the suppliant as Consular Agent for a term of three years certain, and he claimed damages for having been dismissed before the expiration of the period. The Court of Appeal upholding Mr. Justice Day were of opinion that the suppliant's service was nevertheless determinable at the pleasure of the Crown, Sir Claude Macdonald having acted beyond his authority in engaging the suppliant for a term.

19. In the absence of statutory provisions, the relations of the East India Company (and therefore of the Secretary of State for India in Council) and their officials in India would appear to the governed by the rules hereinbefore stated as governing the relations of corporations and their officials. But under secs. 74 and 75 of statute 3 and 4 Will IV c. 85, it was lawful for His Majesty by writing under his Sign Manual, countersigned by the President of the Board of Commissioners, to remove or dismiss any person holding any office or employ-

The law of  
official tenure  
in India.

(a) *Young v. Adams* (1898) A. C. 469.

(b) (1898) A. C. 561.

(c) (1896) 1 Q. B. 116.

ment or commission civil or military under the East India Company in India and to vacate any appointment or commission of any person to any such office or employment ; and nothing in the Act was to take away the power of the Court of Directors to remove or dismiss any of the officers or servants of the Company, but that the said Court was at all times to have full liberty to remove or dismiss any such officers or servants at their will and pleasure. By sec. 3 of the Government of India Act of 1858, all powers hitherto exercised in relation to the officers and servants of the Company amongst others were transferred to the Secretary of State for India (cf. sec. 2 of the Government of India Act of 1915). It seems to follow therefore that under the above provisions of statutes, the Government of India has power to dismiss civil and military officers serving in India at pleasure, and a suit for damages for wrongful dismissal cannot therefore lie against the Government of India at the instance of the dismissed officials upon such dismissal. *King v. Secy. of State for India* (a). In arriving at the contrary opinion in *Hughes v. Secy. of State* (b), Phear, J., appears to have overlooked these provisions, as did apparently Jacob, J., in *Jehangir v. Secy. of State* (c). This being the law, are contracts which the Secretary of State for India in Council makes with persons appointed to various branches of the Government service in India, e. g. education officers, forest officers, men in the geological survey, and mechanics and artificers of railways and other works, stipulating to keep the men in service for a certain term, subject to dismissal for particular causes, enforceable in courts of law? Are such contracts *ultra vires* of the powers conferred by statute upon the Secretary of State in Council? If the language of sec. 75 of the statute 3 and 4 Will IV c. 85 only were looked into, there would seem to be no legal bar to the Secretary of State contracting himself out of the power recognised in sec. 75 as belonging to his predecessors in office, the Directors of the East India Company. If however the power was regarded as a trust reposed on the Directors by the Crown and if with the judges in *Dunn v. Queen* (d)

Legal value of Secretary of State's "covenants" with members of certain services.

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(a) 15 C. W. N. 486n. (1908).

(b) 7 B. L. R. 688.

(c) 6 Bombay L. R. 131 (1913).

(d) (1896) 1 Q. B. 116.

it be held to be contrary to public policy to restrict by agreement the power of arbitrary dismissal of public servants not protected therefrom by law, then one must admit that such contracts are not enforceable in law. Still less is the power of dismissal affected by departmental rules. It was thus held in *Ram Das Hazra v. Secy. of State* (a) that no suit was maintainable against the Government of India by a dismissed public servant for wrongful dismissal even when such dismissal was in contravention of the rules framed by the Government for the consideration of charges against public servants. These rules, it should be remarked are not to be regarded as terms incorporated into the contracts of employment of public servants. They are, as pointed out by the Judicial Committee in *Shenton v. Smith* (b), merely instructions addressed by the Government to its agents for their guidance and have no obligatory force either as agreements or as rules of law (c).

20. Upon this point, the provisions of (the Government of India) Act XXXVII of 1850 "for regulating inquiries into the behaviour of public servants not removeable from their appointments without the sanction of Government" deserves study. The Act, after solemnly reciting the expediency of amending the law for regulating inquiries into the behaviour of the public servants in question and making the same uniform throughout the territories under the Government of India, proceeds in about 22 sections to lay down the procedure for holding formal and public enquiries into the truth of any imputation of misbehaviour against such public servants, whenever in the view of the Government there are good grounds for such an inquiry. The procedure is framed to resemble that of a criminal trial in several particulars and the judicial inquiry may be committed either to the court, board or other authority to which the accused is subordinate, or to specially

The Public Servants (Inquiries) Act examined.

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(a) 18 C. W. N. 106 : 17 C. L. J. 75 (1912).

(b) (1895) A. C. 229.

(c) The Montague-Chelmsford Report on Indian Constitutional Reform, recently submitted to Parliament, appears to me to contemplate the possibility of conferring a quasi-legal tenure on appointments to the "European services", the members whereof may not unlikely find the security of tenure enjoyed in practice under the existing government jeopardised when subordinated to fully or partially self-governing legislative bodies acting through ministers responsible to them and not to the Government of India.



appointed commissioners who at the conclusion of the enquiry are to report to the Government concerned which then passes such orders thereon as to it may appear just and consistent with its powers in such cases. Nothing in the Act, it is stated, is to be construed to repeal any Act or Regulation in force for the suspension and dismissal of Principal or other Sudder Amins or Deputy Magistrates or Deputy Collectors, but a commission may be issued for the trial of any charge against any of the said officers under the Act in any case in which Government may think it expedient (sec. 24). The Act finally winds up with an emphatic reservation (sec. 25) of the authority of Government to suspend or remove any public officer for any cause without an inquiry under the Act. It thus rests entirely with the Governments concerned whether or not to order a semi-judicial enquiry under the Act against the public servant in question and the public servant has not a legal right to demand a formal inquiry under the Act. In substance, therefore, the Act has no more obligatory force than a code of administrative regulations and instructions of the character referred to in *Shenton v. Smith* (a), however much it may affect the appearance of a statute.

A comparative view of official relation-ship in different countries.

21. Everywhere therefore within the British Empire, except as otherwise provided by statute, official tenure is *legally* precarious. But everywhere within the Empire, again, official tenure is in practice a tenure during good behaviour (b). High political offices in the Home Government and in the Self-governing colonies must by their very nature change their incumbents with every change of party. But this (in itself a very modern institution) excepted, the tenure of office

(a) (1895) A. C. 229.

(b) The tendency to regard all offices as life-offices can naturally find *legal* expression in the British system only where a corporate office is in question, and, as to these, it has been held in *Steward v. Dunn*, 1 Dow. and L. 642, 647 (1844) that where an officer is appointed for an indefinite period he is presumed to hold his office for life until the contrary is shewn. Even when the charter of incorporation provides that a particular officer shall be chosen annually, such a provision is regarded as directory only. His tenure is not construed as terminating at the end of the year after his election and he continues in office until death or removal or until another is elected and if necessary admitted into the office, *Prowse v. Foot*, 2 Bro. P. C. 289 (1725) ; Halsbury, Laws of England, Vol. VII, p. 328.

in the Empire, for other than elective offices, is in practice a permanent life-tenure. (a) So well indeed are officials in the British system protected from capricious interference with their term and tenure that employment under the State has come to be an object of keen competition and it has been found possible to impose fairly high qualification standards for recruitment to most services and to institute regularly held competitive examinations for many appointments. In France, Italy and the United States of America the removeability in law of public officials is realised also in practice by the prevalence previously noticed of "the spoils system." In Germany alone officials enjoy *in fact as well as in law* a tenure irremovable otherwise than for cause to be established in a court of justice or in a disciplinary tribunal. I have already suggested in what respects the English system admits of reform and improvement. It has none the less to be conceded that, illogical as it may appear to be, and in fact largely because it is illogical, it works better on the whole than either the German or the French and American systems, for whilst on the one hand it does not lead to the abuses of the "spoils system", it does not on the other (as in Germany) erect the officials into a privileged class. Conditions within the British Empire, however, are not, as to practice, uniform everywhere. The Government of India being itself a Government by a "service" appears not rarely to display what may be regarded, comparatively speaking, as an excessive solicitude for service interests; so that unless an officer should happen to place himself in opposition to these interests, he is not only safe from unjust interference, he may even count upon lenient treatment of, at any rate, his minor

(a) The Report on Indian Constitutional Reform recently submitted to Parliament by the Secretary of State for India and the Governor-General contains more than a hint that with the creation of self-governing institutions in India steps will be taken to protect the rights and privileges guaranteed or implied in the conditions of appointment to the "European services" from interference by these bodies or ministers responsible to them. Paragraph 325 of the Report which deals with the "protection of service interests" seems to suggest the conferment on the services of a quasi-legal tenure which it will not be open to the representative legislative bodies about to be brought into being to modify or take away. But the Government of India will presumably continue to exercise on the members of these services the same powers that they now have of appointment and dismissal at pleasure.

delinquencies by the higher authorities (a). Where such interests are not involved, it is by no means a rare occurrence to find the Government in this country undertaking the defence of a Government official in an action for tort of a purely personal character, that is, arising out of a wrong done not even in the discharge of his public function (b).

Legal and  
extra-legal  
tenures of  
offices.

22. In so far as both the appointment and dismissal of an officer may rest on the pleasure of some authority, whether that authority be the Crown, a minister or other head of department or any other agent of the Crown or a public corporation, the tenure of office is entirely extra-legal. When the appointment only but not the dismissal is at pleasure, the tenure is legal, as is also the case where both appointment and dismissal are governed by law. The tenure of judges of superior courts, for instance, in England, and of officers generally in Germany is thus legal. It follows also that the tenure of officers who depend for their appointment on election, since they are rarely removeable at pleasure and ordinarily hold office for fixed terms and occasionally even for life, is legal.

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(a) What precisely are regarded as service interests it is (for an outsider at least) not easy to define. They are clearly not confined to selfish pecuniary or class interests. Grossly disreputable conduct in office will, it may be safely assumed, be always regarded as a breach of such interests. This is the good side of the "*esprit de corps*" of the Indian Civil Service, as to which see Lecture XII, para 13 *supra*. The Government of India and the Local Governments under it never tire of impressing on their officials the duty of observing the rules of courtesy in their dealings with the Indian public. But neither breach of manners nor (moderately) high-handed behaviour on the part of Government officers appears to be ordinarily viewed as a serious delinquency. It is at any rate impossible that any incident like that which happened in Washington some years ago and which was reported in the *New York Times* of Nov. 24, 1885 (see Goodnow *Comparative Administrative Law*, Vol. II, pp. 85-86) should occur in India. There an individual who had business with one of the departments was treated with incivility by one of its clerks. Complaint was made to the superior officer and the clerk was dismissed from the service by the Secretary with the remark that every man "who had business with the Treasury was entitled to civil treatment and that no employee who was unable to remember that he was a servant of the people and bound to be courteous to those whom he served need expect to be retained".

(b) A case in point is that of a Superintendent of Police which formed the subject of interpellations in the Bengal Council on 19th February 1918. Government in this case appears to have paid the expenses of the Police officer's defence in an action for trespass of a private character which resulted in a decree for damages against him. An attempt to induce the Government to obtain from the officer a refund of the moneys spent by Government in defending the suit proved unsuccessful.

23. Since the official relationship is not founded on contract, it need not necessarily depend for its formation on a bilateral act consisting of an offer on the part of the appointing authority and an acceptance by the appointee. Acceptance appears in fact to have been obligatory under the common law of England, so much so that refusal by a duly qualified person to serve in a public office to which he had been appointed and notice whereof had been given to him was, and perhaps still is, a common law misdemeanour punishable by fine and imprisonment without hard labour (a). The obligation to serve in a public office may also be specifically enforced by a *mandamus* (b). The tendency of modern decisions, at least in America, has been in the direction of undermining the strictness of this rule, since it has been held in that country that acceptance of an office which will take all the time of the incumbent is not obligatory where no provision for compensation is made ; and the possession of one office justifies the incumbent in refusing another ; and in one case it appears even to have been held that as the acceptance of a judicial office disqualifies the incumbent for other offices in the State which are not judicial, no one can be forced to accept such an office. Moreover, the fact of acceptance being obligatory does not dispense with proof, when there is dispute, that the office was in fact accepted (c). More reliance is, in fact, placed upon voluntarism now than in former times in both England and America, though in order to guard against offices which carry no compensation remaining vacant to the detriment of the public interest, it is not unusual for the legislature in either country to provide penalties for non-acceptance. Under secs. 34 and 35 of the (English) Municipal Corporation Act of 1882, every qualified person elected to a corporate office must, unless exempted by law, either accept the office or be liable to a fine. Acceptance of office being obligatory according to common law, it has been held in America that there can be no constitutional objection to a law which makes acceptance of office obligatory and imposes a

Obligation to accept office.

Progress of voluntarism in modern times.

Acceptance of honorary offices made obligatory by statute in England and America.

(a) Halsbury, *Laws of England*, Vol. IX., p. 485.

(b) *R. v. Bower*, 2 Dow, & Ry. 842 (1823).

(c) Goodnow, *Principles of the Administrative Law of the United States*, pp. 255-257.

fine for refusal to serve, and several such statutes have been passed by the States of the Union (a).

Acceptance  
not obligatory  
in France.

24. It is said that in France, it is "almost never the case that the acceptance of office is obligatory. In Germany, refusal to accept an unsalaried office after an election or appointment is attended, where no legal excuse exists, by loss of suffrage for from three to six years and by an increase of circle taxes from an eighth to a quarter. The principle of obligatory honorary services appears to have been originally in force in relation to the elective offices in the cities under Stein's Act of 1808. But it received a wider extension under the Local Government Reform Laws of the latter part of the 19th century, owing to the apprehension felt by the authorities that without its aid it would not be possible to find competent persons to fill the newly created honorary appointments of the justices of the peace and others, and thus defeat one of the main objects of the reforms, viz: to cultivate a greater degree of political spirit and capacity among the well-to-do rural classes in the same way as such spirit and capacity had been cultivated in the municipalities through the same principle as embodied in the Corporation Act of 1808. The principle has not yet been adopted in India, but the success it has met with in Prussia does certainly favour its adoption, under proper safeguards, in India, where the authorities have to contend against public apathy to an even greater degree than they had to do in Prussia. But the adoption of the principle in India must be both cautious and gradual, for if the experience of the Prussian administration seems to encourage its adoption, that of the Roman administration, previously outlined, is fraught with the gravest warnings. Any attempt to use the licensed classes in the localities as mere agents of the Central Government must be unpopular and doomed to failure. The difference between the Roman method and the methods in force in England, the United States and Prussia must not however be overlooked. In the former, service was absolutely compulsory, in the latter it is practically compoundable for a money fine with, in Prussia, some loss (in addition) of civic rights.

Obligatory as  
to honorary  
offices in  
Germany.

Should accep-  
tance of hono-  
rary offices  
be made  
obligatory  
in India.

Compulsory  
services in  
Imperial  
Rome.

II  
Officers'  
rights,

25. Is there a legally enforceable right to an office? "A continuing right to the office", says Goodnow, "can be spoken

(a) Goodnow, Principles of the Administrative Law of the United States, p 257.

of only in the case of an officer whose tenure of office is independent of any administrative superior, so far as the length of the term is concerned. Only those officers have a permanent right to exercise the powers and perform the duties of the office who may not be arbitrarily discharged by an administrative superior. Thus the remedy by means of which the right may be enforced, viz: the *quo warranto*, may not (in England and in the United States) be made use of in the case of offices of no certain duration." "But the question", the learned author goes on, "may come up at the beginning of the official relation rather than at the end and it will naturally come up more frequently in the case of elective than in the case of appointed officers, but it can come up in the case of an appointive office, specially in the United States, where the term is so often fixed by law." In England and the United States, the title to an office is tried by *quo warranto* or its statutory substitute, by means of which the courts decide who is the rightful incumbent of the office in question, and as such entitled to exercise its powers and receive its emoluments. Further, one who is clearly entitled to an office may by *mandamus* force the delivery to him of the *insignia* of office and may in like manner obtain possession of public buildings and records. In both countries, the tendency has been to substitute these proceedings by action or application before special tribunals to try election cases, and in some instances (e.g. in poor law elections in England) the determination of contested elections has been left in the superior authorities of the administration itself (a).

(a) Right to office.

How enforced  
In England  
and America.

26. In India, a suit for a declaration that a person has been duly elected to a municipal office is a suit of a civil nature within the meaning of sec. 9 of the Civil Procedure Code, and being a suit in which the Plaintiff's legal character is in question, it is also maintainable under sec. 42 of the Specific Relief Act. Unless a special tribunal has been created by statute to take cognisance of such suits (in which case its jurisdiction would be exclusive) such a suit will lie in the ordinary civil courts. But if the special tribunal fails to discharge the duties imposed on it under the statute, it can

In India

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(a) Goodnow, Comparative Administrative Law, Vol. II, p. 62; Goodnow, Principles of the Administrative Law of the United States, p. 283.

in a proper case be compelled to do its duty by a *mandamus* under sec. 45 of the Specific Relief Act, provided the conditions of that section are otherwise satisfied. The Chartered High Courts, it seems, have also jurisdiction by a proceeding in the nature of *quo warranto* to restrain a person who has not been duly elected councillor (a).

On the Continent of Europe.

27. "On the Continent of Europe", says Goodnow, "access to the ordinary courts to try the title to an office is seldom allowed. It is believed that such a practice would violate the fundamental principle of the independence of the administration. Generally any dispute as to the title to an office has to be tried by an administrative court and right to appeal against the decision of an election bureau is given not only to the defeated candidate and to the Government, but also, as is the case frequently in the United States, to an elector (b).

(b) Right to resign if exists.

28. The proposition that acceptance of office is obligatory must find its correlate in another that an officer under whatever tenure he should hold his appointment is not free to resign his appointment at will, and may be held to it if the superior authority who has power to dismiss him refuses to accept his resignation. But here too voluntarism has been undermining the principle of obligatory service. In England, in India and I believe in the British Empire generally, the accepted opinion, at any rate amongst officials, is that a resignation is not effective until it has been accepted. In America, judicial decisions appear to be conflicting, but according to Mr. Goodnow almost all the cases holding that acceptance of resignation is necessary were decided with regard to local offices which were obligatory offices, whilst those cases which have held the acceptance to be unnecessary have been decided with regard to offices of the General Government to which the common law rule is not regarded as applying and which take up most if not all the time and attention of the incumbent necessitating the appointment to them of professional officers. "In France and Germany", according to the same author, "while the general right to resign from all offices not obligatory in character is recognised, as in England and the United States, still certain limitations on the

In the British Empire.

In America.

In France and Germany,

(a) Aiyanger's *Municipal Corporations in British India*, Vol. III pp. 41-42.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, p. 64; Goodnow, *Principles of the Administrative Law of the United States*, p. 283.

exercise of the right are to be found in the laws. Thus in France, the Penal Code punishes all officers who by a preconcerted decision resign in order to prevent or suspend the action of some public service ; while in Germany the officer about to resign must give three months' notice of his intention and the resignation is not effectual until he has finished his work, and in case he has public property in his charge, until his accounts have been fully settled ; and the resignation must be accepted" (a).

29. It need hardly be stated that in the absence of statutory provisions there can be no legal right to promotion in public officers. In the absence of such provisions, there is not even the right to the continuance in office on the same salary, wherefore these matters must remain as a rule to be regulated by administrative practice.

(c) Right to promotion.

30. It has been seen that in England, in the absence of statutory provisions, public servants holding appointments at Government's pleasure cannot recover arrears of salaries or other money claims even by resort to the remedy by petition of right, but officers holding on a good behaviour tenure have this right. Similar claims are entertained in America by Courts of Claim wherever these have been established. It seems also to be the law in both countries, that in those rare cases where a duty has been imposed upon an individual officer to pay the legal compensation of other officers and he should refuse to do so, he may according to circumstances be forced to act by a *mandamus* or other available remedy (b). But there is no legal bar to officers employed by local or other corporations, under whatever tenure they may hold, recovering salaries which they have earned or other money claims by action against the corporations concerned. What I have said about salaries appears to apply *mutatis mutandis* to pensions and superannuation allowances which are frequently stated to be only "deferred pay". Though, as pointed out before, a suit against Government may not lie in India for recovery by a dismissed public servant of

(d) Right to compensation

Pensions, if legally recoverable.

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(a) Goodnow, Comparative Administrative Law, Vol. II, p. 95. In Imperial Rome, "the procurator was bound to his post and could not withdraw from it without special authorisation." Mattingly, Imperial Civil Service of Rome, p. 96.

(b) Goodnow, Principles of the Administrative Law of the United States, p. 289. Halsbury, Laws of England, Vol. XXIII, p. 315.



In India, damages for wrongful dismissal, I do not see why a suit may not lie against it for recovery by such a servant of arrears of pay duly earned, and by a superannuated officer for recovery of arrears of pension after they have fallen due. Secs. 74 and 75 of 3 & 4 Will. c. 86 do not touch such claims, and the legal position of the East India Company having been in other respects that of any private or public corporation, it follows that under sec. 65 of the Government of India Act of 1858, now re-enacted in sec. 32 of the Government of India Act of 1915, suits in respect of such claims may be instituted against the Government of India by the officer concerned according to the ordinary procedure and in the ordinary courts.

Right to  
compensation  
how enforced  
on the  
Continent.

31. In France payment of salary may be enforced by appeal to the administrative courts which have sole jurisdiction; in Germany by appeal either to ordinary or to the administrative courts which have concurrent jurisdiction (a).

III.  
Officers'  
duties.

32. I have so long been considering the official relationship from the point of view of an official's rights against his employer. A consideration of his duties towards the employing authority is the complement of what has gone before. The employing authority is entitled to demand a certain standard of good conduct from employees. The standard will vary with the nature of the office and is different in different countries, but whatever this may be in any particular case, failure to observe it is a cause for censure and may even merit dismissal. For instance, sobriety of habit, orderly conduct and courteous behaviour to the public are insisted upon and enforced by office discipline almost everywhere. This discipline is particularly strict in Germany. Active participation in political contests has been regarded as a breach of official etiquette in England and India, and offensive partisanship against the ruling party has come to be viewed with similar disfavour in the United States (b). But perhaps the longest list of official "taboos" to be met with anywhere will be found in the Government Servants' Conduct Rules of the Government of India which are issued in a codified form from time to time (the last time in 1904) and

(a) Duty of  
good conduct  
enforced by  
office discipline.

In Germany.

In England  
and America.

In India.

Government  
Servants'  
Conduct  
Rules.

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 74.

(b) *Ibid*, Vol. II, p. 85.

which as often as they are issued are again overlaid by amendments and interpretations—so difficult it is for the ordinary intelligence to hit the exact dividing line of absolute propriety between the “mays” and the “may-nots” with which these conduct rules abound. Putting aside the exceptions and qualifications, a Government officer broadly speaking may not without the sanction of Government receive any complimentary or valedictory address given in public, promote the collection of public subscriptions for the most laudable object, and may not lend or borrow or acquire property within the local limits of his authority. No Government servant shall promote or manage companies or speculate in investments or ordinarily have connection with the public press. Some of these are very good rules and some one cannot help regarding as almost grandmotherly, and it is round these latter that the exceptions and interpretations alluded to above tend perpetually to gather. The officer must be immaculate who can follow the spirit, not to speak of the letter, of all these rules and interpretations, and few men even amongst officials are really immaculate. However, the net effect of the Conduct Rules and their constant iteration in every variety of style and language (a) has been on the whole to ensure a fairly high degree of purity in the official atmosphere.

33. Amongst other objects sought to be secured by office discipline are prompt performance of official duties and obedience to lawful orders of superiors. But for securing the first of these objects no Government has relied entirely on office discipline. Official duties of more than ordinary importance have in every country been sought to be enforced by penal sanctions enforceable through courts. Mr. Frank Goodnow has acutely observed that penal provisions have developed most in countries where, as in England and the United States of America, the central administrative control over local officials

(b) Performance of official duties enforced by office discipline and also by penal laws.

The latter more in evidence in England and America than on the Continent.

(a) To cite one illustration, the practice of presenting *dalis* (offerings of fruits and flowers etc. in baskets) to public servants, which out of regard for the susceptibilities of the offering public the Government has not seen its way to prohibit altogether, being obviously open to abuse, has proved a perennial source of admonitions from the Secretariats. These exhortations, I notice, are assuming a more and more minatory character and, if I have read the signs correctly, may end before long in total prohibition. See the Punjab Circular No. 1737 dated 22nd January 1918, reproduced in Mr. G. K. Ray's *Rules and Orders Relating to Public Servants*, 4th Edn., p. 92.

Malfeasance  
in office a  
common law  
crime in  
England.

Particular  
acts made  
crimes by  
statute in all  
countries.

Crimes of  
abuse of offi-  
cial powers.

In England.

In India.

has been of the feeblest. Where however, as in Germany, administrative responsibility is extensive, criminal responsibility before courts of law has naturally not developed to quite the same extent. Any act or omission in disobedience of official duty by one who has accepted office, when it is of public concern, is in England a common law crime. The law indeed goes so far as to punish as a crime even improper performance of a discretionary duty, provided the exercise of discretion has been wilfully wrong or corrupt (a). Neglect to perform a duty imposed on a public officer by common law or statute is a common law misdemeanour punishable with fine, imprisonment and loss of office (b). There is no common law criminal liability for mere misfeasance or nonfeasance in office in France and Germany. In all countries, however, it is usual to make certain acts and omissions in disobedience of official duty crimes by statute, for instance in England and in the United States as also in France and Germany an officer who enters upon the performance of the duties of an office without taking the prescribed official oath which by statute is made a condition precedent to entry upon such office is punishable criminally (c).

34. Besides crimes arising from failure to perform official duties and their improper performance, there are special classes of crimes which can be committed only by officials by some kind or other of abuse of their official position. Acts of official misconduct which are punishable under English law as crimes are *inter alia* the following: (i) disclosing official information (ii), acting oppressively with improper motives under colour of office, (iii) accepting bribes, (iv) breach of trust which as between private individuals would give rise only to an action, (v) refusal to serve in public office and neglect to perform such office, (vi) sale of office (d). Chapter IX of the Indian Penal Code deals *inter alia* with the following offences: (i) taking illegal gratification, (ii) disobeying law with intent to cause injury to any person, (iii) framing incorrect documents with intent to cause injury, (iv) engaging in unlawful trading, (v) unlawfully buying or bidding for property. Provision is made in Ch. XI of the Code for the

(a) Bishop, New Commentary on Criminal Law, Vol. I, secs. 459-462.

(b) Halsbury, Laws of England, Vol. IX, p. 486.

(c) Goodnow, Comparative Administrative Law, Vol. II p. 81.

(d) Halsbury, Laws of England, Vol. IX, pp. 480-489.

following among other offences : (vi) disobeying the directions of law with intent to save any person from punishment or any property from forfeiture, (vii) framing incorrect record or writing with similar intent, (viii) intentionally committing for trial or confinement or keeping any person in confinement in contravention of law by a person having legal authority therefor, (ix) intentionally omitting to apprehend or aiding the escape of offenders or persons under sentence by persons charged with the duty of apprehending or keeping in confinement such persons, (x) negligently suffering a person in confinement to escape, (xi) disclosure of official communication which is a criminal offence as well under the Indian as under the English Statute Book (a).

35. The last duty of all public servants, and one which overshadows all others, is obedience. Public interests would unquestionably be seriously prejudiced, if servants of the Government were not kept under the strictest discipline. But a highly disciplined civil service may itself constitute a serious public danger if, as in Russia under the Tsars, it be uncontrolled by law. It then becomes an instrument of oppression all the more potent because, on account of its high discipline, it can be operated like an army. The question—one of the greatest importance to sound administration—thus arises : “To what or to whom is the allegiance of officials ultimately due ? To the law or to their executive superiors ? If it were possible to assume that the executive of all ranks would invariably act in accordance with law, the question would be superfluous and need no answer. If this question to-day is not at all an academical one, it is because in no country has the possibility of the executive wishing to act and acting contrary to law been or can ever really be altogether eliminated.

36. In theory all governments to-day appear to be agreed that officials of all ranks should act in accordance with the law. To give additional point to this profession, the constitutions of most countries go on to provide that officials should be liable to action in courts of law for violations of the law. I have in a previous lecture pointed out how the provisions to this effect in the Austrian and Italian constitutions have been nullified by the governments of these countries failing to provide suitable machi-

(c) Duty of obedience. Need of discipline.

The danger of a disciplined service not subject to law.

IV.  
Necessity of subjecting officials to law.

Admitted everywhere in theory.

Not fully realised in practice on the Continent.

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(a) Act XV of 1889 (as amended by Act V of 1904), sec. 4.

The plea of a  
'State necessity'  
analysed.

nery for giving effect to this pious wish (a). I have also shown in the course of that and a previous lecture how, in spite of all these professions, it is possible on the Continent of Europe to shut out all inquires into the legality of official acts on the plea of their being "acts of government." The plea amounts, in plain language, to a claim by Government and its agents to violate private rights for certain purposes and in certain circumstances of which they themselves must be the judges. In these matters therefore (the extent of which can hardly be defined with precision) officials owe allegiance not to the law but to their official superiors. Officials thus in these countries owe a divided allegiance, to the law in some matters, to alleged State necessity claiming to act in disregard of law in others, the boundary between the two again shifting according to the point of view for the time being of the controlling executive.

Its inadmissibility in England makes for the "rule of law."

Indirect way in which immunity of officials is secured in India in some cases.

37. Of the administrative system of England only it can said truly that officials owe allegiance first and foremost to law, for, as between officials and a subject and even a resident alien, no plea that the act of the official though illegal was justifiable on the ground of State necessity is admissible. It might have been possible to pay the same compliment to the Indian administration, if recent Indian legislation had not shown a tendency to clothe officials with unlimited powers of interfering with the subjects' rights uncontrolled by courts of law, a tendency which is further accentuated by other provisions which proceed to confer immunity from suit or prosecution on officials professing to exercise such powers (b).

(a) See Lecture XVII *supra*, paras. 13-14.

(b) This, one need hardly be reminded, is possible only because the legislature in India taken as a whole is dependent on and controlled by the executive. The facility with which the executive in India can get laws passed conferring on the administration whatever powers it may want is a serious drawback in the administrative machinery. The unlimited powers thus taken are none the less arbitrary because they appear in the garb of law. The fact however that they are ushered into existence by the legislature tends to obscure from the eyes of the officials at any rate their essentially extra-legal character. A facile legislature habitually acting at the call of a professional executive may thus delude members of that executive into a belief that nothing they profess to do under powers given by statutes can be really wrong or arbitrary. If the taking by officials of arbitrary powers be unavoidable, their exercise should at least be made subject to the control of administrative courts as is generally done on the Continent of Europe. See Lecture XXIII *infra*.

38. In the United States, the beneficent English principle of the subordination of officials to the law is so far modified that courts have refused to exercise direct control over the acts of the administration where it may bring them into direct conflict with the Chief Executive. Thus no *mandamus* has ever been issued against the President and its issue against State Governors is generally condemned. In the case of *Ex parte Merryman* (a), a writ of *habeas corpus* absolutely failed of its purpose because the officer to whom it was issued was supported in his action by the President. Some of the State courts, we are told, have endeavoured to extend this exemption from the jurisdiction of the courts to heads of departments. But this is a highly retrograde step which has been condemned by the Supreme Court itself (b).

Position in  
America.

39. Administration according to law would be a mere pretence, if it was left to the executive to say in all cases when its agents should be free to disobey the law with impunity and when they should obey it. This really represented the state of things on the Continent of Europe so long as public officers were immune from the jurisdiction of the courts for their wrongful acts without sanction previously obtained of Government. I have in a previous lecture (c) traced the steps by which officials have been gradually brought under the law in France and Germany. To recapitulate them broadly: First, the power of sanction was taken away from the administration and placed in the hands of a more or less independent Court of Competence, and the next step was to establish a tribunal more or less impartial to examine complaints against officials, jurisdiction over which is by the Court of Competence denied to the ordinary tribunals. These tribunals called Administrative Courts as also the Courts of Competence were in the beginning composed wholly of officials removable at the will of the executive. But the spirit of law has been at work transforming both these courts into tribunals more or less independent, though still composed generally of persons engaged in the active work of administration. I have previously described how when

No administration in accordance with law where Government servants cannot be sued without State sanction.

Necessity of sanction replaced on the Continent by the institution of administrative courts.

Officials freed from responsibility on the Continent when proceeding allowed against State.

(a) Taney's Rep. 246.

(b) Goodnow, Principles of the Administrative Law of the United States, p. 486.

(c) Lecture XVII *supra*, para. 3.

a complaint against a public officer is turned over to administrative courts, the official himself ceases to be personally responsible for the act in question and responsibility is taken over entirely by the Government (a).

But not in  
England.

40. Intervention by the Crown in an action brought against one of its officers is not an uncommon occurrence in England, and whenever it appears to the authorities that the act in question was "at the instance of a public authority in the assertion of a public right, where the public is interested in the execution of it", the Attorney General on behalf of the Crown can demand a trial at bar on the ground that the Crown has an interest in the subject matter of the suit. In that case, it will be for the plaintiff to show the Court that the Crown was "misinformed" and that the statement of the Attorney General that the Crown was interested was groundless. If he fails to satisfy the Court as to this, the suit will be regulated by the Crown Suits Act 1865 and the rules thereunder. Where the Crown has thus ratified and approved of the conduct of the officer, it necessarily takes upon itself the responsibility for the act complained of upon the maxim *omnis ratihabitio retrotrahitur et mandato priori aequiparatur*; but (statutory provisions apart) no damage can be obtained against the Crown, for "the Crown can do no wrong". But unless the complainant be a foreigner resident abroad, in which case the act will be regarded as an "act of State" in the English sense (b), the officer does not thereby become "irresponsible", for as Cockburn, C. J., said the *Feather v. Reg* (c), "no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject though done by the authority of the Crown." (d).

(a) It should be remembered that the administrative courts in Prussia have not even yet been given jurisdiction over the decisions of ministers, and, except in so far as they relate to the administration of internal affairs and to purely local taxes, over those of any officers of the central administration. In regard to these therefore, when the ordinary civil courts decline jurisdiction, the subjects are without any legal remedy and must seek relief by petition to higher administrative authorities. Goodnow, *Comparative Administrative Law*, Vol. II, p. 248.

(b) *Buron v. Denman*, 2 Exch. 167 (1848).

(c) 6 B & S 257 (1865).

(d) Chaster, *Public Officers*, 1908, pp. 635-636.

41. Thus whilst on the Continent the successful intervention of the State in an action against the official relieves the latter of all personal responsibility and the State becomes liable in certain circumstances even pecuniarily upon such intervention, it has ordinarily neither of these effects in England, and though even in England both venue and procedure are altered, both court and procedure are the ordinary court and the common law and statutory procedure. The relative effect on the administration of the two methods I have previously discussed and these need not be detailed again here (a). Suffice it to say, that though the British subject may pecuniarily be the loser when there has been a breach of law committed by an official, he gains more than he loses by the greater regard habitually paid to law by officials who can never purchase personal immunity by the countenance of superior authorities.

English and the Continental rule contrasted.

42. I have also shown how in regard to criminal actions against officials, which according to Continental practice are within the jurisdiction of ordinary courts, the institution of public prosecutors enables the Government in Continental countries to protect officials from criminal prosecution at the instance of private individuals, thus nullifying to that extent the rule of law in these countries (b). In England and the United States, officers who correspond to the public prosecutors on the Continent have no monopoly of prosecution which may be initiated by private individuals. In both countries, however, the public prosecutor can quash the prosecution by entering a *nolle prosequi*. In America, moreover, management of cases before the grand jury and the conduct of prosecution after it has been initiated are said to have passed "largely, indeed almost entirely, into the hands of the public prosecutor", a state of things which Mr. Goodnow, no indiscriminate admirer of English institutions, deplors as tending to relax the control over the administration exercised by the criminal courts. "The Public prosecutor", says this writer, "is in more or less close affiliation with the administration and is liable to overestimate the importance of administrative independence to the detriment of private right and in some cases of administrative efficiency", even when his dependence upon the administration

Officials liable to criminal action in the ordinary courts on the Continent. But prosecutions are controlled by Government.

Public prosecutors on the Continent and in England.

In America.

Evils of monopoly of prosecution of public prosecutors.

(a) See Lecture XVII *supra*, para. 27.

(b) See Lecture XVII *supra*, paras. 6-8.



for the tenure of his office does not induce him to act upon more questionable motives. "We have had in our administrative history", says Mr. Goodnow, "too many instances of refusal on the part of the District Attorney to proceed with the prosecution of public officers or such negligence on his part in conducting a prosecution which he has been forced by public opinion to initiate that officials guilty of official or other crimes have been able to escape responsibility for their actions altogether" (a).

Difference in the relation of officers & the law in England and on the Continent.  
An illustration.

43. The general attitude of the English and Continental systems of administration respectively regarding the relation of public officers to the law has, I think, been made sufficiently clear in what I have said in this and the previous lectures. The difference in standpoint is best illustrated by contrasting the manner in which riots and breaches of the peace of a more or less widespread character are dealt with in France and England respectively.

"State of siege" in France.

Unknown to English law.

44. The French constitution in terms recognises the right of the Government, whenever it sees fit, to suspend all constitutional guarantees of citizens by proclaiming a "state of siege", under which authority ordinarily vested in the civil power for the maintenance of order and peace passes entirely to the army. We shall hardly go wrong", says Dicey, if we assume that during this suspension of ordinary law, any man whatever is liable to arrest, imprisonment or execution at the will of a military tribunal consisting of a few officers who are excited by the passion natural to civil war." "Now this kind of military law", he continues, "is utterly unknown to the English constitution. Soldiers may suppress a riot as they may resist an invasion; they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion. During the effort to restore peace, rebels may be lawfully killed, just as enemies may be lawfully slaughtered in battle or prisoners may be shot to prevent their escape, but any execution (independently of military law) inflicted by a court martial is illegal and technically murder" (b).

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 184.

(b) Dicey, *Law of the Constitution*, 6th Edn, pp. 288-9.

45. The position of a soldier or other servant of the Government called upon to assist in quelling a riot is in no way different from that of any other subject who has not only the right but is under the common law, as a matter of duty, bound to assist in putting down breaches of the peace. "Officers, magistrates, soldiers, policemen, ordinary citizens, all occupy in the eye of the law the same position. They are each and all of them authorised to employ so much force, even to the taking of life, as may be necessary for that purpose and they are none of them entitled to use more" (a). "Whether the force employed was necessary or excessive will, specially where death has ensued, be ultimately determined by a judge and jury, and the estimate of what constitutes necessary force formed by a judge and jury sitting in quiet and safety after the suppression of a riot may differ considerably from the judgment formed by a general or magistrate who is surrounded by armed rioters and knows that at any moment a riot may become a formidable rebellion and the rebellion if unchecked become a successful revolution." (b).

Legal position of civil & military officers participating in the suppression of riots in England.

46. In brief, the common law permits and in fact makes it obligatory (on pain of indictment for failure) on officials (and non-officials who have been called upon to assist) to use all the force necessary for suppressing the riot and no more. He is required to find the limits of that necessity unerringly, though regard being had to the circumstances in which his judgment is called into exercise, to do so, in the case of most persons, must be a psychological impossibility. The law appears at first sight to be unduly favourable to individual rights and to impose an impossible standard of caution and circumspection on officials charged with maintaining the public peace in the face of emergencies which may not be of their own creation. But if they have acted reasonably and without oppressive severity, they can always count upon the legislature granting them *ex post facto* indemnity, by passing an Indemnity Act. However wanting in logic the arrangement may appear, it has the supreme virtue of keeping officials fully alive to the restraints of reason even in emergencies, without at the

Its implications.

(a) Dicey, Law of the Constitution, pp. 284-285.

(b) Dicey, Law of the Constitution, p. 287.

same time unduly hampering their capacity for controlling them.

"State of war" and the legal position of military authorities in relation thereto.

47. Though this has often been disputed, the generally accepted opinion further is that if the condition of things amounts to "a state of war", in England (just as much as in other parts of the Empire) the jurisdiction of ordinary civil tribunals over the action of the military authorities is suspended, and this in spite of the fact that for some purposes civil tribunals may still be permitted to pursue their ordinary course (a). This appears to follow from the fact that when a war is raging, the military are the only authorities which can maintain order and to question their authority in such a predicament is to sanction anarchy. But as to even this, whether or not a "state of war" did in fact prevail at the time of the act complained of is one for the decision of a civil court when peace has been restored. The mere proclamation of martial law by itself does not, as a like proclamation of a "state of siege" does in France, bar the jurisdiction of the courts, and it is for the courts to say whether in assuming jurisdiction as they did, the military courts did not usurp authority not possessed by them under the law. The proclaimed area thus does not wholly lose its affiliation to law even when it is invaded by war (b).

48. I now proceed to examine the relation of public officials to the law in India.

49. With reference to the topic of martial law just discussed there is on the statute book of India an Act (IX of

Power of Government in India to proclaim "a state of rebellion" and try certain offences committed in the proclaimed area by special courts not subject to review by High Courts.

(a) The courts in such circumstances must be supposed to exercise jurisdiction not *ex proprio vigore*, but solely by virtue of the authority conferred on them by the military commander. They act in other words as licenses of the military authority. See *Ex parte Marais* [1902] A. C. 109, and the minority opinion delivered by Chase, C. J., in *Ex parte Milligan*, (1866) 4 Wall. 2.

(b) *Ex parte Marais*, (1902) A. C. 109; Dicey, *Law of the Constitution*, 6th Edn. Note XII, pp. 502-519. In the United States, however, the proclamation by the President or the Governor of a State that a "state of war or insurrection" exists has been taken by courts of law to be conclusive that such a state exists, statutes construed as attaching conclusive force to such proclamations being upheld as constitutional. See *Martin v. Mott*, 12 Wheat. 19, *In re Boyle*, 6 Idaho 609, and *Meyer v. Peabody*, 212 U. S. 78. But see *Ex parte Milligan*, 4 Wallace 2, in which the majority held that the continuance of military government after the courts are reinstated is a gross usurpation of power (exercised in this case without statutory authorisation if that makes any difference, since the powers of the legislatures in America are limited by the constitution).

1857), the State Offences Act of 1857, which was passed upon the outbreak of the Indian Mutiny and received the Governor General's assent on 30th May 1857. The Law Local Extent Act, XV of 1874, declared it to be in force in the whole of British India except the Scheduled Districts, and it has been extended to various Scheduled Districts by notifications issued under the Scheduled Districts Act, XIV of 1874, and to other parts of British India not within the jurisdiction of the Governor General in his Legislative Council by regulations issued under the authority of the Governor General in Council. Unlike the Defence of India Act of 1915, the Act of 1857 though passed to meet an emergency became a permanent addition to the law of the land. It provides *inter alia* that whenever the Executive Government of any Presidency or place shall proclaim that any district subject to its government is or has been in a "state of rebellion", it shall be lawful for such Government to issue a commission for the trial of all persons who shall be charged with having committed within such district, after a day to be specified in the commission, ( any ) crime against the State, murder or arson, robbery or other heinous crime against person or property," and thereupon "the commissioner or commissioners authorised by any such commission may hold a court in any part of the district mentioned in the commission, and may there try any person for any of the said crimes committed within any part thereof", and pass upon every person convicted of the aforesaid crimes any sentence warranted by law for such crimes. The judgment of the commissioner or commissioner is by the Act made final and conclusive, and the court of the commissioner or commissioners under the Act is expressly declared not to be subordinate to the Sudder Court (now the High Court). In short, the Executive Government is by this Act authorised to proclaim something like a "state of siege" in its discretion, thereby depriving the ordinary courts of their jurisdiction, and have all charges of offences of the descriptions specified in the Act tried by something like courts martial. These courts are no doubt expected to act according to the forms of the law and pass sentences warranted by the law, but the trial and sentence not being subject to review by a judicial tribunal there is no real guarantee that they shall be in conformity with the law.

Officers & soldiers taking part in the suppression of riots not criminally responsible for acts done in good faith and may not be prosecuted for other acts without Government sanction.

50. The statutory provisions relating to the suppression of riots also show a deliberate departure from English common law. These, first enacted by the Criminal Procedure Code of 1872 and now embodied in Ch. IX of the Code of 1898, embody (according to Sir James Stephen) the principle laid down in the charge of Tindal, C. J., to the grand jury of Bristol in 1832 (a) as to the duty of soldiers in dispersing rioters. But in fact the rules of the Chapter carry the law a good deal further than the law in England, since they expressly indemnify from criminal liability all persons acting in good faith in compliance with requisitions under secs. 128 and 130 of the Code of 1898, and forbid prosecution of magistrates, soldiers and police officers except with the sanction of the Governor General in Council (sec. 132). The civil responsibility of the officials concerned appears however to have been left untouched (b).

Superior Government servants can be prosecuted for crimes committed in discharge of public functions only with Government's permission and then only in a manner to be determined by Government.

51. More retrograde is the provision of sec. 197 of the Criminal Procedure Code (Act V of 1898) which lays down that no judge or public servant not removable from his office without the sanction of the Government of India or the Local Government, who is accused as such judge or public servant of any offence, shall be prosecuted except with the previous sanction of the Government having power to order his removal or of some officer empowered in this behalf by such Government or of some Court or other authority to which such judge or public servant is subordinate and whose power to give such sanction has not been limited by such Government. The section further provides that such Government may determine the person by whom, the manner in which and the offence or offences for which the prosecution of such judge or public servant is to be conducted and may specify the court before which the trial is to be held. The provision, it should be noted, does not apply to all Government officials and does not bar civil actions, but in so far as it does apply it recalls the provisions

(a) Quoted in *R. v. Pinney* 5 C. & P. 262, note (1832).

(b) Cf. sec. 3 of the English Riot Act (1 Geo. 1, Stat. 2, c. 5 which gives complete indemnity to justices, constables and persons assisting them for any injury caused in the course of dispersing, seizing or apprehending rioters who remain together an hour after the reading under sec. 1 of the proclamation calling upon them to disperse.

now obsolete of Continental administrative law (a) which would not allow proceedings against servants of the State without its authority (b). One need not be surprised therefore to find judges imbued with the spirit of English public law straining the language of sec. 197 in order to limit its application within as narrow a compass as is possible. Thus it has been held that sanction under the section is only necessary when the offence charged is an offence which can be committed by a public servant as such, i. e. in which his being a public servant is a necessary element in the offence, as for instance the offences under Ch. IX and under secs. 217 to 225A of Ch. XI of the Indian Penal Code (c).

52. The definition of "public servant" in the Indian Penal Code is however so comprehensive, that the protection of this section has had perforce to be extended to municipal commissioners and chairmen of municipalities. *The Chairman of Municipal Council, Ellore v. R.* (d). But a chairman *delegate* even though a municipal commissioner can, it has been thought, be well left out in the cold, *Venkatesalu Naidu v. Heeraman Chetty* (e). It is fortunate, however, that a municipal corporation, though it may be extinguished by the Government (a process which may be viewed as an accentuated form of dismissal) is not a "public servant" and may thus

Civil liability of officials in India how affected by statutory grants of powers to interfere with subjects' rights coupled with grants of immunity from action for erroneous or wrongful use.

(a) It survives, curiously enough, only in Switzerland. Lowell Governments & Parties in Continental Europe, Vol. II, p. 220, n (1). Also *supra*, paras. 10 & 15. As under sec. 197 of the Indian Criminal Procedure Code, this provision of Swiss administrative law applies only to criminal prosecutions and not to civil actions.

(b) Not only does the Government possess exclusive power of initiating criminal proceedings against its superior servants, it has also absolute control over the conduct of all prosecutions under sec. 493 of the Code; and under sec. 494 of the Code, the public prosecutor may, with the consent of the court, in cases tried by a jury before the return of the verdict and in all other cases before judgment is passed, withdraw from any prosecution. The public prosecutor in India, as in America, has the control but not the monopoly of criminal prosecution.

(c) *Nando Lal Basak v. N. V. Mitter*, I. L. R. 26 Cal. 852 (1899); *In re: Harlahar*, 2 Bom. L. R. 1079 (1900); *R. v. Lakshman Sakharam*, I. L. R. 2 Bom 481 (1877) following *R. v. Parshram*, 7 Bom. H. C. R. 61 (1870); *Corporation of Calcutta v. Administrator General of Bengal*, I. L. R. 30 Cal. 927 (1903); *Municipal Commissioners of Madras v. Major Bell*, I L. R. 25 Mad. 15 (1901).

(d) Weir I, 243 (1894).

(e) Weir II, 226 (1898).

be prosecuted without the previous sanction of Government.  
*R. v. Municipal Commissioners of Calcutta* (a).

53. As regards civil liability, the legal position of public officers in India should on principle be on a level with that of officials in England. In substance, however, it is made widely different by the wider discretionary authority to interfere with the rights of subjects given by Indian statutes to many classes of officials, specially as the grant is very often coupled with an express gift of immunity, civil or criminal or both, and conditioned or not as the case may be upon the officer having acted in good faith. The several Regulations and Acts authorising the detention of suspects by Government, without trial and without disclosure of reasons (Reg. III of 1818, Act XXXIV of 1850 and Act III of 1858) constitute by themselves a perpetual "suspension of the Habeas Corpus Act" in regard to persons who may have been arrested and detained in accordance with certain *formulae* provided by those statutes. Under the Indian Press Act of 1910 (b), the High Court is given certain powers of reviewing orders of forfeiture made under the Act upon applications for revision preferred by aggrieved persons, but otherwise no "civil or criminal proceeding shall be instituted against any person for anything done or in good faith intended to be done under this Act". The Defence of India Act IV of 1915 which is to remain in force during the continuance of the world war just over and for a period of six months thereafter (c) and by which the Government virtually

(a) I. L. R. 3 Cal. 758 (1878).

(b) As to the character of the powers of forfeiture taken by Government under this Act, see *In re. Mahomed Ali* I. L. R. 41 Cal. 466 (1913); *Mrs. Besant v. Emperor*, I. L. R. 39 Mad. 1085 (1916); and *In re: Mrs. Besant* I. L. R. 39 Mad 1161 (1916).

(c) A committee presided over by Mr. Justice Rowlatt of the King's Bench Division of the English High Court, which was appointed by the Government of India "to investigate and report on the nature and extent of the criminal conspiracies connected with the revolutionary movement in India and to examine and consider the difficulties that have arisen in dealing with such conspiracies and to advise as to the legislation, if any, necessary to deal effectively with them," has proposed the inclusion (with modifications and subject to certain suggested safe-guards) of some of these emergency measures as a permanent addition to the statute book of India. As these pages are being seen through the press, a bill embodying these recommendations is already under consideration in the Legislative Council of the Governor General.

assumes absolute authority over the affairs of the country, by sec. 11, provides that "no order under the Act shall be called in question in any court and no suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under the Act". But nothing even in these emergency legislations can equal the plenitude of arbitrary power conferred on the Commissioner of Police of Calcutta in dealing with disorderly houses, for by an amendment of the Calcutta Police Act made by sec. 32 of Act III B. C. of 1907, the decision of the Commissioner of Police that a house, room or place is used as a brothel or disorderly house etc. is declared to be final and the legality and propriety thereof is not to be questioned in any trial or judicial proceeding in any court (a). The power of search possessed by magistrates in India under secs. 94-96 of the Criminal Procedure Code (Act V of 1898) as interpreted by the Privy Council in *Clarke v. Brojendra Kishore* (b) is far more extensive than any possessed by magistrates in the United Kingdom. The number of statutes which have thus proceeded to make the executive, in certain matters, "a law unto themselves", far-reaching as some of them are in their operation, is I believe not yet very numerous. But there can be no mistaking the tendency, which found expression *inter alia* in the unsuccessful attempt recently made to obtain for Indian legislatures powers which they do not now possess of depriving the subject of his right to sue Government "in certain cases or classes of cases" (c). There is no tendency which officials of the Indian administration at the present moment need guarding against more carefully than this to take unlimited discretionary powers touching the most valued rights of the subjects by legislation of this description (d).

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(a) The order, it is necessary to note, is to be passed after a quasi-judicial hearing. Suppose the Commissioner of Police passes such an order without an enquiry as provided by the Act?

(b) I. L. R. 39 Cal. 953 (1912).

(c) The proposal was dropped by reason of the adverse attitude taken up by the Joint Committee of the two Houses of Parliament to which the Bill had been referred. See the abstract of the proceedings before the Committee in 20 C. W. N., pp. 17-28 (notes).

(d) If arbitrary powers must continue to be exercised by the administration there should be no delay in establishing administrative courts to check and review the exercise of these powers. See Lecture XXIII *infra*.



Permissible  
grants of  
immunities  
to public  
servants.

Immunities of  
the Chief  
Executive,  
legislators  
and judges  
necessary in  
the public  
interest.

Immunities  
of ministerial  
officers in  
England.

(a) When  
acting under  
warrant or  
order of a  
superior  
court.

54. It must not however be inferred from what I have just stated that public interest requires that no kind of immunity of any description should be granted to any official in any circumstance. I have in previous lectures dealt with the immunities of the Chief Executive, legislators and judicial officers who, as I have taken pains to show, should, in the public interest itself, be indemnified, within limits varying with the nature of their offices, for even wrongful acts done by them (a). Similar considerations of public interest may lead to the recognition of immunities more or less limited in favour of officials in the lower ranks of the administrative services.

55. The general rule in England regarding purely ministerial officers is that they will not be held responsible for damages where they have followed instructions which are legal on their face and which contain nothing to indicate that such instructions have been issued in excess of the jurisdiction of the officer who issued them. As applied to the case of an officer acting under warrants or orders of superior courts at common law, the rule has been stated to be that he can claim the protection of the warrant only where there has been accurate performance and the order or warrant was within the jurisdiction of the issuing Court or apparently so. The decision in *Stockdale v. Hansard* (b) seems to suggest that warrants and orders of the House of Commons afford protection only when strictly within jurisdiction. If the process issue from a court or person having competent jurisdiction, it will confer an authority even though there be error or irregularity in the previous proceedings or the charge contained in it be utterly unfounded. But if it be defective on the face of it, as if there be a mistake in the name of the party to be arrested, or if the name of the officer or party be inserted without authority and after the issue of process, the apprehension may be resisted and the killing of the officer will, it is said, be manslaughter only (c).

56. With regard to justification, it has been held that a man acting under legal authority is not confined to the authority under which he has preferred to act at the time he acted,

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(a) See *supra* Lectures XIV, XV and XVI.

(b) 9 Ad. and E. 1 (1839).

(c) Chaster, *Public Officers*, pp. 618-619.

but he may resort to any authority which justified his proceeding (a). Again where the judgment is subsequently reversed as being wrong in point of law, all irregular process under it before the appeal is heard is good and affords a justification to all parties acting under it. But to pretend to use a legal privilege as a mere cloak for doing a wrongful act affords the wrong-door no more protection and gives him no greater right than if the privilege had no existence (b). *Lucas v. Nockelle* (c).

57. As regards warrants and orders other than those of superior courts at common law, the liability of an officer when acting under a warrant of this class, *where there has been an adjudication*, is practically identical with that of an officer acting under a warrant or order of a superior court at common law, the main distinction being that whereas the presumption in favour of jurisdiction is general in the case of warrants or orders of superior courts, it extends only to what appears on the face of the particular instrument in the case of warrants and orders of inferior courts, so that it is necessary for a party who relies upon the decision of an inferior tribunal to show that the proceedings were within the jurisdiction of the court. *When, however, there has been no adjudication* the rule as to liability is different. Acting under such warrants and orders, the officer is (subject to statutory exceptions) protected only where the person or body issuing had jurisdiction to do so, and execution thereof is strictly carried out. If there was apparently jurisdiction, though none in fact or clearly none at all, the warrant or order is equally valueless (d).

(b) When acting under warrant or order of other than superior courts.

58. In America, "the weight of authority", according to Goodnow, "seems to be in favour of the rule that a ministerial officer is relieved from all responsibility for the execution of

In America.

(a) *Hooper v. Lane*, 6 H. L. C. 443 at p. 449 (1859); *Clarke v. Brojendra Aishore*, I. L. R. 36 Cal. 483 (1909), *per* Harington, J.

(b) Mr. Bigelow has very ably explained that "privileges are not full legal rights" but conditional ones which those entitled to them forfeit by malice. See Bigelow, *Law of Torts*, 3rd Edn., 1908, pp. 15, 24, 248-261.

(c) 10 Bing. 157 (1833).

(d) Constables are specially protected by statute (24 Geo. 2 c. 44. sec. 6) for arresting under a warrant of a justice notwithstanding any defect of jurisdiction. Chaaster, *Public Officers*, pp. 624-5, 627-8.

orders fair on their face even when he is satisfied that the officer issuing them acted in excess of his jurisdiction (a).

Are military  
persons  
exceptions ?

59. To the general rule of immunity of ministerial officers outlined above, military persons when carrying out the orders of civil authorities appear, under English law, to be an exception, for according to English law, a person does not by becoming a soldier cease to be subject to the jurisdiction of ordinary courts as a citizen. But in America, we are told, in order to maintain that discipline without which a military force would amount to nothing, the courts are careful in the exercise of their jurisdiction over military persons not to hold them to such responsibility as will cause them to have hesitation in obeying orders which are apparently within the jurisdiction of the officers issuing them (b).

In India.

Different rule  
in regard to  
civil and crimi-  
nal immu-  
nity.

60. Ministerial officers in India enjoy different degrees of immunity in respect of acts done in execution of orders issued to them by superior authority in civil and criminal proceedings respectively. The civil immunity is ampler than the criminal, since under Act XVIII of 1850 no officer of any court or other person bound to execute the lawful warrants or orders of any judge, magistrate, justice of the peace, collector or other person acting judicially shall be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same, this being understood by Mayne to mean (c) that the warrant is an absolute protection to the officer so long as he obeys it whether it is lawful or unlawful or whether it was issued with or without jurisdiction ; whereas under sec. 78 of the Indian Penal Code, where the court had no jurisdiction to issue the order, it is necessary further to show that the officer acting upon the order in good faith believed that the court had jurisdiction. But, of course, even a valid warrant must, to confer immunity, be carried out in a legal manner.

(a) Goodnow, Principles of the Administrative Law of the United States. p. 407.

(b) *Ibid.*, p. 402.

(c) Mayne, Criminal Law of India, 2nd Edn., p. 378 ; police officers in India are protected in the performance of their executive duties by express legislative enactments. Act V of 1861, sec. 43, Mad. Act XXIV of 1859, sec. 54 ; Bom. Act. IV of 1890, sec. 80, Bom. Act IV 1902, sec. 140.

With these provisions should be read sec. 111 of the Government of India Act of 1915 which provides that the order in writing of the Governor General in Council for any act shall, in any proceeding, civil or criminal, in any High Court acting in the exercise of its Original Jurisdiction, be a full justification of the act except so far as the order extends to any European British subject. But nothing in this section exempts the Governor General or any member of his Executive Council, or any person acting under their orders from any proceedings in respect of any such act before any competent court in England.

61. Apart from the qualified protection enjoyed by ministerial officers, the general rule in England is that where a public officer acts or purports to act by virtue of powers which the law confers upon him and while so acting is guilty of any illegality by way of commission or omission he is personally responsible to the individual who has sustained damage thereby, and the liability is not confined to cases where there has been either excess of the authority conferred or breach of the duty imposed by law. It extends also to cases where the officer is strictly within the powers conferred on him, but is guilty of harsh or oppressive conduct in their exercise. Where a legal privilege is used as a mere cloak for doing a wrongful act to the prejudice of another, it affords the wrong-doer no more protection and gives him no greater right than if the privilege had no existence. *Hickman v. Massey* (a).

No immunity in general, of officers other than those already considered.

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(a) (1900) 1 Q. B. 752; Chaster, Public Officers, pp. 631-2. To the general rule stated in the text, there are however certain statutory exceptions. Constables are absolutely protected in the case of rioters being killed, maimed or hurt whilst they are engaged in suppressing a riot. 1 Geo. I. St. 2. c. 5, sec. 3. Customs and excise officers are so protected for seizing goods as are liable to forfeiture where there was probable cause for such seizure, for stopping carts and waggons to search for smuggled goods though none be found, for firing into ships liable to seizure or examination for not bringing to when required, and for seizure and detention of ships under the Foreign Enlistment and Pacific Islanders Acts. The protection however covers the seizure only and does not extend to damages for deterioration or destruction of goods wrongfully seized. Chaster, Public Officers, p. 636. Under 57 and 58 Vict. c. 60, sec. 514, the wreck receiver is similarly protected in case of a wreck where any person is killed, maimed or hurt by reason of his resisting the receiver in the execution of his duty or any person acting under his orders. So also are officers acting under the Explosives Acts where, on reasonable cause to believe that any explosive or ingredient thereof found by them is liable to forfeiture,

62. The principle should be borne in mind in this connection that, as illustrated in the case of *Armory v. Delamirie* (a), every presumption shall be made to the disadvantage of a wrong-doer. If an officer uses the powers which he possesses against an individual on any other than public grounds, he becomes a wrongdoer and this principle becomes applicable (b). Also, where a power to enter upon lands or tenements is conferred by law on an individual and when having entered in pursuance thereof he commits a misfeasance (i. e. exceeds his authority) it shall be presumed that he entered with the intention of exceeding his authority and the trespass committed shall have relation back to the time of entering, in other words, whatever privilege he possessed is by the excess annulled (c).

When special injury necessary to sustain action.

63. A mere breach of duty on the part of a public official which affects the public generally will not in the absence of special injury suffered by an individual give rise to an action in the latter's favour. Even where special injury has been suffered, an action may arise or not according as the power is obligatory or discretionary, for liability will arise in the latter case only when the breach has been malicious. A duty may be optional in form but obligatory in substance—so that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require its exercise (d). The law is substantially the same in America.

Breach of discretionary duty when actionable.

64. In both English and American law, a superior officer is not (as I have stated elsewhere) ordinarily responsible for the wrongs of his subordinates which he did not directly authorise. This follows from the fact that both subordinate and superior officers are agents of the government and not the

Superior officer not ordinarily liable for tort of subordinate.

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they seize and detain the same. 38 and 39 Vict. c. 17, sec. 74. And so generally are officers acting under the Public Health Acts if the matter or thing were done *bona fide* for the purpose of executing the Acts, and persons acting in good faith and with reasonable care in pursuance of the Lunacy Act of 1890. Chaster, *Public Officers*, pp. 636-637.

(a) 1 Strange, 504 (1722).

(b) Chaster, *Public Officers*, p. 632.

(c) *Six Carpenters' case*, 8 Coke 146a (1610).

(d) Chaster, *Public Officers*, pp. 640-1.

former of the latter. But a public officer cannot escape personal responsibility for that which he should have done himself by getting it done by another who may be a public officer. Nor is a public officer personally liable in respect of contracts made by him on behalf of the State. Both these rules are in consonance with the ordinary law of agency. But a public officer, under recent English decisions, cannot be made liable for breach of a warranty of authority when it is established that he made the contract on behalf of the State without its authority (a).

No liability in respect of contracts on behalf of Government.

65. Though English law shows little disposition to extend the immunity of officials beyond the limits laid down by the common law (b), it has quite recently seen fit to grant them certain procedural advantages by the Public Authorities Protection Act of 1893. These include a shorter period of limitation and a right to previous information to enable the defendant officer to forestall action by offer of amends (c). Similar protection is afforded by Indian law under sec. 80 of the Civil Procedure Code. No suit can be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to him or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint must contain a statement that such notice has been so delivered or left. Under Indian as under English law, no notice is required in cases of claims for injunctions. *Attorney General v. Hackney Local Board* (d), *Flower v. Low Leyton Local Board* (e), *Gunada v. Nalini* (f). But it is impossible to assent to Mr. Justice Woodroffe's opinion in the last-mentioned case to the effect that when public officers are sued not in their admitted official capacity but as in-

Public Authorities Protection Act of England, its scope.

Similar protection in India.

Notice of action.

(a) Goodnow, *Principles of the Administrative Law of the United States*, p. 407; Halsbury, *Laws of England*, Vol. XXIII, pp. 314, 321-2; *supra*, Lecture XVII, paras 20-23.

(b) Several instances of statutory immunity are enumerated by Chaster in his 'Public Officers', pp. 636-7. See footnote to para 6 *supra*.

(c) Halsbury, *Laws of England*, Vol. XIII, pp. 346-9

(d) L. R. 20 Eq. 626 (1875).

(e) 5 Ch. D. 347 (1877).

(f) 12 C. W. N. 1065 (1908).

dividual trespassers, no notice under sec. 424 of the Code of Civil Procedure Code of 1882 (which corresponds with sec. 80 of the existing Code) is necessary, for the simple reason that English jurisprudence does not recognise in officials a double capacity, one official and the other private, for the purpose of impleading them in suits. An official is sued, if at all, in his individual capacity, or else the suit is one against his principal the Government (when a suit lies against Government) or the local corporation. The act must have been done in the discharge of official duty, or, if one may choose so to describe it, in the defendant's official capacity, to attract the operation of sec. 80, but the suit must be against him personally or not at all. See *Raleigh v. Goschen* (a). Corporate officers in India are entitled to a similar notice (b). Under sec. 81 of the Civil Procedure Code of 1908, in a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity, the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and when the court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person. Under sec. 82, a decree against a public officer must specify a time within which it shall be satisfied, and if the decree is not satisfied within that time, the Court is to report the case for the orders of the Local Government and execution shall not issue unless the decree remains unsatisfied for the period of three months computed from the date of such report. Under sec. 60 cl. (1) there can be no attachment of the salary, or allowances equal to the salary, of any public officer while on duty (i) to the extent of the whole of the salary when it does not exceed Rs. 20 a month, (ii) to the extent of Rs. 20 where it exceeds Rs. 20 but does not exceed Rs. 40 a month, (iii) to the extent of a moiety of the salary in any other case, or of the allowance (being less than salary) of any public officer while absent from duty (e). Art. 2 of Sch. I of the Limitation

Other privileges.

Limitation.

(a) (1898) 1 Ch. 73.

(b) Aiyangar's Municipal Corporations in British India, Vol. III, p. 430, note 18.

(c) Cf. sec. 6, cls. (f) and (g), of the Transfer of Property Act (IV of 1882) which make public offices, salaries of public officers, whether before or after

Act providing a period of limitation of 90 days for suits for compensation for doing or omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India (which must apply to many suits against public officers) is the nearest approach to the limitation provision of the English Public Authorities Protection Act.

66. The object of the above provisions of law, it should be remembered, is not to deprive subjects of their right to redress in respect of wrongful acts of officials, but to ensure that the right should not be abused in order to harass public officials and obstruct them in the due discharge of their functions to the detriment of public interests. The laws of all countries however go further and in order to ensure due exercise by official of their lawful powers provide special rules of criminal law for their protection. In England and the United States, the protection is extended only to certain classes of officers, viz: those who come in contact with the people as bearers of a distinct command of a competent authority to do or not to do some particular thing, as for instance officers who have to do with the administration of justice, the collection of revenue and generally with the exercise of police powers. Where for the purpose of exercising such powers, it is necessary for such officers to use force they may do so without being accountable for the damage they may cause, but the law declares it to be a crime to resist them and when armed resistance is offered it becomes a very serious matter for the persons who offer such resistance (a). The offence of offering resistance is a distinct and separate offence from the violation of the law which the officer is seeking to enforce at the time the resistance is offered. This protection of the criminal law is available however only during the performance of duties. A person resenting an official act already performed and assaulting the official out of revenge is guilty of assault on a private individual and punishable as such (b).

V.  
Special  
provisions of  
criminal law  
to protect  
officers.

In England  
and the Uni-  
ted States.

they have become payable, stipends allowed to military and civil pensioners of Government and political pensions inalienable by private treaty.

(a) Goodnow, Principles of the Administrative Law of the United States, p. 284.

(b) Goodnow, Comparative Administrative Law, Vol. II, p. 66.



In France and  
Germany,

67. In France and Germany, according to Mr. Goodnow, while the same protection is granted to public officers as is granted in England and the United States, the law goes a step further and declares that an outrage on or violence to public officers either during the discharge of their duties or *as a result* of such duties is punishable (a)

In India.

68. Under the Indian Penal Code, it is an offence punishable with fine or various terms of imprisonment or both (i) to intentionally offer resistance to taking of property by the lawful authority of a public servant (sec. 183), (ii) to intentionally obstruct the sale of property offered for sale by the lawful authority of a public servant (sec. 184), (iii) to voluntarily obstruct any public servant in the discharge of his public functions (sec. 186). Under sec. 189 of the Code, whoever holds out any threat of injury to any public servant or to any person in whom he believes that public servant to be interested for the purpose of inducing that public servant to do any act or to forbear or delay to do any act connected with the exercise of the public functions of such public servant, shall be punished with imprisonment, simple or rigorous, for a term which may extend to two years or with fine or both. Under sec. 224, any person intentionally offering any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence is punishable with imprisonment, simple or rigorous, for a term which may extend to two years or with fine or both. Under sec. 225, resistance or obstruction to the lawful apprehension of another person or rescuing or attempting to rescue such person is made an offence punishable ordinarily with the same sentence as is provided by sec. 224, but with severer sentences, if the person sought to be rescued was liable to apprehension for a crime, varying with the gravity of the offence on account of which the person in whose interest the offence is committed was liable to apprehension. Resistance or obstruction to lawful apprehension or rescue not covered by secs. 224 and 225 of the Code is made punishable by sec. 225 B. with imprisonment, simple or rigorous, for a term which may extend to six months or fine or with both.

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(a) Comparative Administrative Law, Vol. II, p. 66. Cf. sec. 332, Indian Penal Code.

69. According to sec. 332 of the Indian Penal Code, any one who voluntarily causes hurt to any person being a public servant in the discharge of his duty as such or with intent to prevent or deter that or any other public servant from the discharge of such duty, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, is punishable with imprisonment, simple or rigorous, for a term extending to three years or with fine or with both, and if the hurt caused is grievous hurt, the imprisonment, under sec. 333, may extend to ten years. Simple assault or use of criminal force upon a public servant in the same circumstances is, under sec. 353 of the Code, punishable with imprisonment, simple or rigorous, for a term which may extend to two years or with fine or with both. Under sec. 358 of the Code, grave and sudden provocation on the part of the person assaulted is no mitigation of the offence, if the provocation is given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant. Murder of a public servant is not reduced to the offence of culpable homicide, if it was due to provocation arising out of anything a public servant did in the lawful exercise of the powers of such public servant; and if hurt or grievous hurt was caused owing to such provocation, the offender does not merit the lighter punishment provided for these offences in cases of grave and sudden provocation by secs. 334 and 335 of the Penal Code. Along with these provisions may be considered that of Exception 3 to sec. 300 of the Code which provides that culpable homicide is not murder, if the offender being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which in good faith he believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill will towards the person whose death is caused.

70. Again, the right of private defence against apprehended injury to person and property is under certain circumstances importantly qualified by sec. 99 of the India Penal Code when the apprehension of injury (not being death or grievous hurt) arises from an act done by or under the direction of a public servant. There is, that section lays down, no right of private defence against an act which does not reasonably cause

Right of private defence how qualified where wrongful act that of a public servant.

the apprehension of death or grievous hurt if done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law, nor against a similar act done or attempted to be done by the direction of a public servant acting in good faith under colour of his office though the direction may not be strictly justifiable by law. But a person will not under that section be deprived of the right of private defence unless he knows or has reason to believe, when the act is done or attempted to be done by a public servant, that he is a public servant, and when the act is done or attempted to be done by the direction of a public servant, that the person doing the act is acting by such direction, or unless he states the authority under which he acts or if he has authority in writing unless he produces such authority if demanded.

VI.  
Resistance to  
illegal acts  
of public ser-  
vants when  
offence and  
when not.

71. Acts purporting to be done under the authority of law may, according to Mayne, be illegal in one of four ways : *First*, when the warrant under which the officer acts is on its face legal, even though defective in form and is issued by an authority competent to issue such a warrant, but has been improperly or irregularly issued. In such a case resistance is always unlawful. In determining whether a warrant or order was issued by a competent authority, the question for consideration is whether the authority was competent to issue the sort of warrant or order placed in the hands of the officer for execution. In this connection should be borne in mind what I have previously stated, viz., that nothing is to be presumed to be beyond the jurisdiction of the superior courts (such for instance as the High Courts) but that which specially appears to be so, and nothing to be within the jurisdiction of inferior courts (for instance mofussil civil and magistrates' courts and Presidency magistrates' courts) but that which is expressly alleged. *Howard v. Gosset* (a).

72. *Secondly*, where the warrant is issued by a competent authority but is on its face illegal. Bearing in mind the fact that due care and attention are necessary elements of "good faith" under the Penal Code, a public officer acting upon such a warrant cannot evidently rely on the provisions of section 99.

73. *Thirdly*, where there is legal authority to do a particular act, but it is done in an illegal way by the officer entrusted with the execution of it. No immunity from civil liability, I have previously shown, can be claimed in respect of such acts ; but though, under the English law, resistance to such an act would appear to be lawful, section 99 seems to make such resistance unlawful, if the official was acting in good faith and under colour of his office, good faith of course implying due care and attention.

74. *Fourthly*, where the act is ordered by one who had no jurisdiction to order it or executed by one who had no authority to execute it. Resistance to such act, according to Mayne, is lawful in England and does not seem to be unlawful in India, since the words "not strictly justifiable by law" in section 99 seem to point to cases where there is excess of jurisdiction as distinct from a complete absence of it—to cases in which the official has done wrongly what he might have done rightly and not to cases where the act could not possibly have been rightly done. The act, in other words, must not be absolutely *ultra vires* of the official who did or authorised it. *Reg. v. Tulsiram* (a) ; *Reg. v. Jogendra* (b).

75. Sec. 99 seems to embody what appears beyond doubt to be the law in England, that an arrest either in civil or criminal process may be lawfully resisted where it can be made only by warrant and where the warrant though actually issued is not in the possession of the officer who makes the arrest, and *a fortiori* where there never has been a warrant (c).

76. Lastly, it is to be carefully remarked that though the circumstance that an officer acting without justification in law is so acting *under colour of office* may in a case properly coming under sec. 99 deprive a person against whom it is directed of the right of private defence which he would have had against a private individual, it does not nullify the effect of grave and sudden provocation in mitigating the offence as provided by sec. 300, exc. (i), secs, 334 and 335 and sec. 358 of the Penal Code ; still less does it go to make resistance

Resistance to illegal acts of public servants in itself no offence but only on account of its consequences as being in excess of the right of private defence.

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(a) I. L. R. 13 Bom. 168 (1888).

(b) I. L. R. 21 Cal. 320 (1897).

(c) Mayne, Criminal Law of India, 2nd Ed., pp. 448-449.

offered to such an act an offence under secs. 182, 224, 225 or 225 B or convert offences under secs. 322 and 323 into offences under secs. 332 and 333 of the Code or an offence under sec. 352 into one under sec. 353. In other words, to constitute the special offences provided for by those sections, the officer must be acting "in discharge of his duties and not merely under colour of his office." The right of private defence not being available, the offender may be guilty of crimes under other sections of the Code, but not of offences which by these sections are made such only because the acts involve injury or obstruction to a public servant (a).

VII  
Legal position of officers  
*de facto*.

77. Before closing this lecture I must briefly refer to one topic which bears indirectly upon the legal relations of officers. It must be obvious from what I have said before that whenever appointments to offices and the tenure thereof come to be regulated by law, the possibility arises of persons not legally authorised to hold an office or to continue in it coming to occupy it and exercising its functions. According to strict logic, all acts of persons who intrude into office without legal right should be void as well against the Government as against third persons. But as public interests must seriously suffer if all acts of persons in office were to be open to question on the ground of their not having had legal title, English common law, with characteristic good sense, early recognised the principle that persons who though not legally officers have yet acted under colour of right, i. e. have been declared elected or appointed or have held over in office in good faith or whose assumption of office has been for a long time acquiesced in by the public, are to be regarded for many purposes as officers and that their acts will be given the same faith and credit as the acts of *de jure* officers (b). The doctrine has been very fully

(a) *Reg. v. Dalip*, I.L.R. 18 All. 246 (1896); *Abdul Gafur v. Reg.*, I.L.R. 23 Cal. 896 (1896); *Tafazzul v. Reg.*, I. L. R. 26 Cal. 630 (1899); *Durga Charan v. Nabin Chandra*, I. L. R. 25 Cal. 274 (1897); *Anand Lall, v. Reg.*, I.L.R. 10 Cal. 18 (1883); *Lilla Singh v. Reg.*, I. L. R. 22 Cal. 286 (1894); *Satis Chandra v. Jadu Nandan*, I. L. R. 26 Cal. 748 (1899); Mayne, Criminal Law of India, 2nd Edn., p. 448.

(b) Goodnow, Comparative Administrative Law, Vol. II, pp. 25-26; Principles of the Administrative Law of the United States, p. 257. *Parker v. Kett*, 1 Lord Raymond 658 (1701); *R. v. Bedford Level Corp.*, 6 East 356 (1805); *Rex v. Lisle, Andrews* 263 (1738); *Bush v. Collins*, 7 Johns 549

developed in the United States of America, most offices in that country being held on a disputable elective tenure and for short terms ; and there it has been settled beyond controversy that the official authority of a person *de facto* in office and his acts should not be questioned collaterally and must be regarded as lawful so far as third parties are concerned. For the rule to apply, however, it is necessary that the so called official should have held at least under a colour of title and must not have been a mere intruder, i. e. he must have been formally elected or appointed though his election or appointment might not be deemed valid.

78. The question has sometimes been asked whether when the office itself has not been created by law, as for instance under an unconstitutional statute, a person duly elected to such office is a mere intruder or at least a *de facto* officer. After some vacillation, reasons of public convenience have prevailed upon the courts in the United States pronouncing in favour of the latter view, and it has been held that until the statute is set aside as unconstitutional, the person elected to the office created by it is a *de facto* officer whose acts and authority cannot be collaterally attacked. But *de facto* officers may of course be forced to vacate office by direct attack in suitable legal proceedings, e.g., by information in the nature of a *quo warranto*. Moreover, his tenure being invalid, he cannot build up any claims upon it, cannot recover compensation, nor bring an action in his official capacity without showing title, nor may he when sued escape responsibility for an act which may be justified only by a valid title to his office. *De facto* officers are further liable as intermeddlers for damages resulting from their negligence. They must further perform all duties connected with the office during the time they assume to hold it and may be punished criminally for the commission of official crimes. Like executors *de son tort*, they are subject to the burdens and obligations, but not entitled to the privileges and profits of the office (a).

Legal position of person holding office created under unconstitutional statute.

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(1811) ; *Patterson, v. Miller*, 2 Metc. 493 (1859). The principle has been applied in India in: *Pulin Behari Das v. King Empiror* 16 C.W.N. 1165, (1911) where the English and American authorities are exhaustively reviewed by Mookerjee, J., at pp. 1128-32.

(a) Goodnow, Principles of the Administrative Law of the United States, p. 253.

## LECTURE XIX.

### OF MILITARY PERSONS (a).

The military status as distinguished from the ordinary official status.

1. The legal position of military persons is best indicated by contrasting it with that of civil officers. A civil official, whatever his rights and liabilities as such, never ceases in his *propria persona* to be a citizen. He may sometimes have privileges beyond what is enjoyed by the ordinary citizen and may be subject to liabilities from which the ordinary citizen is free. The official relationship, as I have shown before, was no doubt in its origin and still is in its incidents one of status, that is to say, a relationship not modifiable by contract. But no man's individuality is lost in his office. An officer is a private person holding an office, in virtue of which he is possessed of powers and is subject to duties beyond those possessed and owed by the ordinary citizen. But a citizen he remains nevertheless all the time he is in office.

Partial loss of civil rights.

2. But the military status means a great deal more than the merely official. It involves, in the persons subject to it, a distinctly marked diminution of citizens' rights. Even in the system in which the military status is least removed from the civil, it was possible, so recently as 1858, to lay down that every person who enters into the military service engages" (in matters concerning his military status) "to be entirely at the will and pleasure of the Sovereign" (b). Partly as a make-weight and partly in the public interest, a military person may have given to him certain privileges (c), but these, as I have already shown, may equally well be enjoyed by civil officials.

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(a) "Military persons" include not soldier and officers only but also certain employees serving with the army. Cf. the Indian Army Act, VIII of 1911, sec 2.

(b) Per Cookburn, C. J., in *Mansergh's case*, 1 Best and Smith 400 (1861). The law is the same in the United States, *Ex parte Vallandigham*, (1863) 1 Wall 243. See also U.S.A. Constitution, 5th and 6th Amendments.

(c) For instance, in English law, in the matter of making wills and certain exemptions from stamp and license duties, from service on juries and municipal offices, from arrest and imprisonment for debts and attachment in execution of his pay or equipment. See War Office Manual of Military Law, 1914, Ch. XII.

The real difference between a civil and military officer from the point of view of law is to be found in the degree and extent to which it is possible to regard a military person as being "outside the pale of" ordinary civil law.

3. But when it is stated that military persons as such are in any degree outside the pale of civil law, it must not be understood that they can have, at least at the present day, no civil rights, and that even in matters of military discipline they are turned over absolutely to the arbitrary disposal of their superiors so that they can be driven about like slaves by their commanders where and how they please. There undoubtedly was a time when even in England soldiers engaged in the King's wars were in very truth "at the will and pleasure of the Sovereign". The earliest military law (for military persons are everywhere now governed by law similar to though not identical with the civil law, and administered not by civil judges but by military courts) still in force, that of Norway and Denmark, dates from 1683, whilst it did not take its present shape in England until so late as 1881. In fact a properly conceived military code does not become a necessity until there is a standing army, and in England there was no standing army before 1660. When war broke out, troops were raised as occasion required, and ordinances for their government, or (as they were afterwards called) articles of war were issued by the Crown with the advice of the constable or the peers and other experienced persons ; or were enacted by the commander-in-chief in pursuance of an authority for that purpose given in his commission by the Crown (a). These ordinances or articles remained in force only during the service of the troops for whose government they were issued and ceased to operate on the conclusion of peace (b). That the earlier articles were of

Military persons governed by a special code of military law.

Development of military law.

(a) Grose, *Military Antiquities*, ii. p. 58, cited in the War Office Manual of Military Law, 1914, p. 6.

(b) This explains why English common law never recognised the right of the Crown by prerogative to make articles of war in time of peace, a principle embodied in the Petition of Right of 1628. Military discipline could be enforced during peace only by means of special statutory provisions which made such acts as desertion etc. punishable before the ordinary courts as felony. The first Mutiny Act made mutiny and desertion in peace time punishable by sentence of court martial but did not give the Crown power to make articles of war for the governance of the army generally during peace.



excessive severity is what one might have expected, those of Richard II, Henry V. and Henry VII inflicting death or loss of limb for almost every crime. "Gradually, however, they assumed somewhat the shape which they have borne in modern times, and the ordinances or articles of war issued by Charles II in 1672 formed the ground-work of the articles of war issued in 1878, which were consolidated with the Military Act in the Army Discipline and Regulation Act of 1879, now replaced by the Army Act of 1881" (a).

Character of military law in England at the present day.

4. Thus "military law", in England at any rate, "is part of the statute law of England, with the considerable difference that it is administered by military courts and not by civil judges, is construed in the same manner and carried into effect under the same conditions as to evidence and otherwise as the ordinary criminal law of England" (b).

Severer and more summary than civil law.

5. Of the character of this law, it will, for my present purpose, be sufficient to say that in the interest of the severer discipline which must be maintained in the army, as contrasted with merely civil associations, "acts and omissions which are mere breaches of contract in civil life, e.g. desertion or disobedience to orders, must, if committed by soldiers even in time of peace, be made offences with penalties attached to them, while on active service any act or omission which impairs the efficiency of a man in his character as a soldier must be punished with severity (c). Certain forms of punishment in all countries but the United States can be given by the superior officers without judicial intervention for small purely military offences where a summary procedure is required (d).

Military courts, a specialised variety of administrative courts.

6. Military matters have, in other words, been taken out of the jurisdiction of civil courts and have been relegated to military courts administering not the ordinary civil but special

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The Crown did not get this power as regards colonies and dependencies until 1712, and for the United Kingdom until 1715, and, for places outside the Dominion until 1803. War Office Manual of Military Law, 1914, Ch. 2.

(a) See p. 7, Ch. II, "History of Military Law", by Lord Thring, in the War Office Manual of Military Law, 1914.

(b) See the same writer's Introductory to the said Manual, at p. 1.

(c) Lord Thring at p. 6 in Ch. II, "History of Military Law," in the War Office Manual of Military Law, 1914.

(d) Article on "Military Law" by Sir John Scott in the Encyclopedia Britannica, 11th Edn.

rules of military law. The nations of the world to-day have indeed shown a singular unanimity in this respect. Military courts everywhere are in fact a specialised form of administrative courts, and England which has resolutely denied administrative courts a foothold in every other part of her body politic has had to yield on this one point of the administration of her army. Military courts in England, as elsewhere, are a species of administrative courts, and English institutional writers who declare that there are no administrative courts in England overlook or ignore the existence of these courts.

Even in  
England.

7. These courts are nevertheless held in a kind of loose affiliation to the superior courts of England, and the prerogative writs of prohibition and *certiorari* may in proper cases issue from them to courts martial and other military courts and writs of *habeas corpus* will issue whenever it is made out that a person has been kept in illegal custody by order of a court martial or other military authority. Courts martial are in fact regarded as courts of limited (though in matters of military discipline exclusive) jurisdiction—courts which it is the duty of the High Court of Justice in all proper cases to keep from exceeding or abusing that jurisdiction. It follows from this that military officers and members even of courts martial acting beyond their legal competence may lay themselves open to actions for damages for torts or to criminal proceedings at the instance of aggrieved individuals who may be soldiers or civilians.

Though in  
theory  
affiliated to  
the superior  
civil courts.

Issue of  
prerogative  
writs against  
military  
courts and  
officers.

8. Although there never has been any question that the High Court can and will interfere to prevent a court martial or other military court from exceeding or usurping jurisdiction, as for instance if a court martial were proceeding to try a person not subject to military law or were to pass a sentence which the court had no power whatever to pass, it is a fact that the very few cases of application for a prohibition actually made have been uniformly unsuccessful (a). The writ of *certiorari* which is ordinarily issued almost as a matter of course to review the decisions of inferior courts (b) will issue in the case of a sentence by a court martial only when the rights

High Court  
never uses  
these writs to  
interfere with  
matters of  
military  
discipline.

(a) *Grant v. Gould*, 2 H. Blackstone's Report 69 (1792); *Re: Poe*, 5 Barneville & Adol. p. 681 (1833); *McCarthy's case*, 114 W. R. (Ir.) 918 (1866).

(b) *Colonial Bank v. Willan*, L. R. 5 P. C. 417 (1874).

affected by the judgment of the court are civil rights and the court is acting without jurisdiction. The jurisdiction of military courts in matters affecting military discipline being, as stated before, exclusive, no writ will issue when the rights affected are dependent on military status or military regulations (a). Again since the courts will never interfere in matters of military discipline, it seems as a rule to be a sufficient return to a writ of *habeas corpus* that the person in custody is a person subject to military law and that all the proceedings were according to military law (b). Only when the return does not show sufficiently the military character and obligations of the prisoner, or when want of jurisdiction on the part of the confirming officer is established, would the prisoner in whose favour the writ was issued be discharged (c).

Actions for damages for wrongful exercise of military authority when maintainable.

9. As cases involving questions of military discipline and military duty are cognisable only by a military tribunal (d), no suit for damages for improper exercise of powers in matters involving such questions will be entertained unless (i) the act in question was in excess of the officer's powers, e. g., in cases of unauthorised infliction of corporeal punishment or where a person not subject to military law is dealt with under that law (e) and (ii) where military authority is exercised with excessive severity, oppression or cruelty amounting in fact to an abuse of jurisdiction (f). But no action lies for mere errors of judgment and even actions for malicious prosecution are not maintainable though malice and want of reasonable and probable cause should be alleged and proved (g).

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(a) *Mansergh's case*, 1, Best & Smith 400 (1861); *Robert's case*, Times, 11th June 1879.

(b) *R. v. Suddis*, 1 East, 306 (1801).

(c) *R. v. Douglas*, 3 Q. B. 825 (1842); *Porrett's case*, Perry's Oriental Cases, 414 (1844).

(d). *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94 (1869); *Marks v. Frogley* (1898) 1 Q. B. 888 at p. 899.

(e) *Warden v. Bailey*, 4, Taunt 67 at 77 (1811); *Mostyn v. Fabrigas*, Cowp. 101 (1775); *Glynn v. Houston*, 2, Man. & G. 337 (1841); *Goodes v. Lieutenant Colonel Wheatly*, 1 Campbell 281 (1808). *Sutherland v. Murray* (1788) cited in *Sutton v. Johnstone*, 1 T. R. 493 at p. 538.

(f) *Sutton v. Johnstone* 1 T. R. 493 at 504 (1786); *Wall v. Maenamara* cited in 1 T. R. at p. 536.

(g) *Dawkins v. Paulet*, L. R. 5 Q. B. 94 (1869).

10. It need hardly be stated that members of military tribunals and witnesses and parties appearing before them are entitled to the same protection for statements made in the course of proceedings before them as judges presiding over and parties and witnesses appearing before the ordinary courts (a). Complaints made to proper authorities are under the general law privileged, whether the authorities are civil or military, and reports made in the discharge of official duties by military authorities are also privileged under the general law.

11. A military officer, it follows, may lay himself open to prosecution for acts done in excess or oppressive abuse of authority, when the acts constitute criminal offences (b).

Criminal prosecution for abuse of military authority.

12. It would thus appear that in English law, in matters affecting military discipline, the soldier is taken almost wholly out of the jurisdiction and protection of the civil courts and is subjected almost entirely to military tribunals administering military law which, as has been previously indicated, is both severer and in some matters more summary and arbitrary than civil law. To this extent there is loss of civil status, and a sensible diminution of the rights of citizenship. But neither military law nor the procedure of military courts is to-day dominated by caprice, and so far as the exigencies of military service allow military persons in England enjoy the protection of law and of trial according to the forms of law (c).

Military law is law though it sensibly diminishes civil rights.

13. But the jurisdiction of military courts in no country is confined entirely to matters of military discipline. Under the English system, these courts are authorised to try and punish soldiers for civil offences also but not for the most serious offences, e. g., treason, murder, manslaughter, treason felony or rape, if those offences can, with reasonable convenience, be tried

Concurrent jurisdiction of military courts over civil offences.

(a) *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. 255 (1873) & L. R. 7 H. L. 744 (1875).

(b) *Governor Wall's case*, 28 Howell's St. Tr. 51; *Ensign Maxwell's case*, (1807) cited in the War Office Manual of Military Law, p. 143; *R. v. Thomas*, 4 M. & S. 442 (1815).

(c) For an excellent short summary of the procedure of military courts of modern countries, see Sir John Scott's article on "Military Law" in the *Encyclopædia Britannica*, 11th Edn.

How exercised.

by a civil court, unless indeed the offence is committed on active service. Subject to the above exceptions, a military court can try all civil offences of a soldier wherever committed. But in practice, in the United Kingdom, in most parts of India and in most of the colonies, where there are regular civil courts close by, it is as a general rule considered inexpedient to try a civil offence by a military court, more specially if the offence is one which injured the property or person of a citizen, or if the civil authorities intimate a desire to bring the case before the civil court. This practice, however, is not invariable, and readily yields to considerations which may make it expedient that the trial should make place according to the swifter and more summary procedure of military courts which may in some cases deal out more exemplary sentences than civil tribunals. On the other hand, the more serious offences will almost invariably be referred to the ordinary courts, particularly where intricate questions of law are likely to arise (a).

A soldier in England is subject to all civil duties.

14. It would thus appear that soldiers and other military persons, under the English law, are as to certain civil offences as a general rule (except in times of war) almost exclusively under the jurisdiction of civil courts, that as to most other civil offences, the jurisdiction of civil and military courts are concurrent and as to purely military offences, the jurisdiction is exclusively in military courts (b). It is with reference to this last class that the soldier is governed by a special law of military status; in all other respects he is a citizen. Whilst undergoing thus a certain diminution of civil rights, he is subject to all a citizen's duties. The legal position of a soldier called on by the civil authorities to assist in suppressing a riot I have already dealt with in a previous lecture (c). It was then

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(a) War Office Manual of Military Law, 1914, pp. 85-86.

(b) Under the English Act (as also under the Indian) conviction or acquittal before a civil or a military court is a bar to a further trial for the same offence by a military court, but conviction or acquittal by a military court is no bar to a subsequent trial for the same offence before a civil court. So here too the primacy of the civil jurisdiction is maintained where both the civil and the military authorities claim jurisdiction. The Indian Act further makes provision for the determination of conflicts by the Governor General in Council whose decision is final. See secs. 157 and 162 of the English Act and secs. 69-71 of the Indian Act VIII of 1911.

(c) See Lecture XVIII *supra*, paras. 45-46.

noticed that under English law, a person does not by becoming a soldier cease to be subject to the restraints of civil law. He is in fact subjected in addition to the severer restraints of military law. Being subject to both jurisdictions, a soldier may indeed conceivably find himself in the unhappy predicament of being illegally ordered by his military superior to do an act which he knows would lay himself open to prosecution in the ordinary court, at the same time that disobedience of such order will be punished by the military court as a military crime. In the words of Lord Haldane (a), a soldier may be "in peril of being on the one hand tried and shot by a court martial and on the other hand of being tried and hanged by a judge and jury. But so far from this being considered a ground for conferring immunity upon soldiers for carrying out orders of their superiors which they dare not disobey, to Lord Haldane it appeared to furnish a reason why all officers commanding troops called upon to quell a riot should be particularly circumspect to see that the orders they deliver do not exceed the law.

Unhappy situation of a soldier asked to quell a riot.

Why not relieved against.

15. The immunity of military persons executing sentences or orders passed by courts martial or other military authorities does not appear under English law to stand on any different footing from that of ministerial officers, which I have considered in a previous lecture (b). Sec. 170 of the English Army Act as amended by sec. 1 of the Public Authorities Protection Act of 1893 confers on military officers the same procedural advantages which the latter Act has conferred on civil officers.

Immunities and protections of military persons concerning the discharge of their official duties

16. The English Army Act applies to European officers and soldiers serving in India in the same manner as to the rest of the British army. But the Indian soldiers in the Indian army are governed by the Indian Army Act VIII of 1911 and rules framed by the Governor General in Council thereunder. In its broad outlines, the Indian Act follows the English, and does not for my present purpose require independent consideration. It will be useful however to draw attention to some provisions

The military law of India.

(a) See his statement before the Select Committee on the Employment of the Military in Cases of Disturbance, quoted in the War Office Manual of Military Law, 1914, p. 227.

(b) See *supra*, Lecture XVIII, paras. 55-60.

of the Indian Act and to certain privileges conferred on military persons by that Act and other statutes of the Indian legislature.

Military  
privileges in  
India.

17. Sec. 111 of the Indian Act expressly provides that no president or member of a court martial, no judge or advocate or superintending officer, no party to any proceeding before a court martial or his legal practitioner or agent and no witness acting in obedience to a summons to attend a court martial shall, while proceeding to, attending on or returning from a court martial, be liable to arrest under civil or revenue process. Express provision to this effect is made in the English Act in respect of witnesses only (sec. 121), but the protection expressly given by the Indian Act to persons other than witnesses is available in England under the general law. No person subject to the Indian Act is liable to be arrested for debt under any process issued by or by the authority of any civil or revenue officer (sec. 119). Neither the arms, clothes, equipments, accoutrements or necessities of any person subject to the Act nor any animal used by him for the discharge of his duty can be seized, nor can his pay or allowance be attached by the direction of any such court or officer (sec. 120). An Indian soldier can secure priority of hearing by courts of cases in which he is concerned whether as plaintiff or defendant. Under various Acts of Parliament and statutes of the Indian and local legislatures, military persons in India are entitled to the following privileges:—

(1) By sec. 139 of the English Army Act, the pay of an officer or soldier of the regular forces (including the Indian army) is protected from deduction other than those authorised by Act of Parliament, Royal warrant, or Act of the Governor General in Council.

(2) All government pensions (including military pensions) are protected from attachment in execution of decrees of civil courts under sec. 60, proviso (g), of the Civil Procedure Code of 1908 and sec. 11 of the Pensions Act of 1871.

(3) An officer or soldier, actually serving in a military capacity, who is a party to a suit and cannot obtain leave of absence, by writing signed in the presence of his commanding officer, may authorise any person to sue or defend in his stead. (Civil Procedure Code, Act V of 1908, Or XXVIII).

(4) A power of attorney to institute or defend a suit when executed by an officer, warrant officer, non-commissioned officer or private is exempted from fees under the Court Fees Act (sec. 19 of Act VII of 1870).

(5) Receipts for pay or allowance of non-commissioned officers or soldiers when serving in such capacity need not be stamped (Stamp Act, II of 1899, Sch. I.)

(6) Certain exemptions from payment of Tolls when on duty [ Indian Tolls (Army) Act II of 1901, sec. 3 ]

(7) Exemptions from restrictions as to possession of arms and ammunitions under the Arms Act and Rules (a).

18. There is nothing in the Indian Army Act to indicate the relation in which, in the contemplation of the Indian legislature, the military courts stand towards the civil tribunals in India. Can any of the Chartered High Courts, for instance, issue a writ of prohibition or a writ of *certiorari* upon a court martial in India in circumstances in which similar writs would issue against an inferior civil court? The question, by no means an academical one, has not yet arisen. But supposing such a case does arise, arguments for and against the issue of such writs, as also of writs of *habeas corpus*, will easily occur to any one. Considering however that the possibility of such a case arising must be remote, I refrain from discussing the subject with a view to formulating definite conclusions on the point.

Relation of civil & military courts in India not defined.

19. We have seen how narrow under English law is the exclusive jurisdiction of military courts and how even that jurisdiction is not altogether free from interference by the civil courts and how military persons at the same time that they are subjected to the special jurisdiction of military courts are yet not absolutely free from the jurisdiction of civil courts.

Exclusive subjection of soldiers to military law & courts more complete on the Continent.

(a) Indian Army Manual, 1911, pp. 88-89. Persons in His Majesty's army (except when by the law in force for the time being they are specially made liable to serve as jurors or assessors), are under sec. 320 of the Criminal Procedure Code, along with several classes of civil officers (e. g. police officers, persons engaged in the preventive service of the customs departments, persons employed in the post office and telegraph departments, salaried judges, commissioners and collectors of revenue or customs and persons engaged in the collection of revenue whom the collector exempts from serving on juries and officers in civil employ superior in rank to a district magistrate) are exempt from liability to serve as jurors or assessors.



In most European countries outside England, however, all persons belonging to the military class, even in times of peace, are in general judged exclusively by military law administered by military courts. In other words, in those countries a soldier is a soldier, and not a soldier and a citizen as well. In several European countries, however, in recent times, distinct approaches have been made towards English conditions.

French and Swedish military law now resembles the English.

20.. In 1908, France took steps to abolish courts martial in time of peace, all common law offences being made triable by the ordinary courts, breaches of military discipline such as rebellion, insubordination, desertion and the like being tried by mixed courts composed of civil and military magistrates. Soldiers not in active service, says a recent Swedish report, should be answerable for infractions of common law under the jurisdiction of the civil courts, whilst all infractions of military order or discipline committed by soldiers whether on active service or not should be judged by military courts. All modern governments are agreed that military courts alone must judge all offences, even offences at common law, committed by soldiers forming part of an army on campaign. The difference arises in regard to offences committed in times of peace. Sweden, Great Britain, France, Italy and the United States of America, as a general rule, place offences against the common law in time of peace under the jurisdiction of the civil courts. In the United States offences against good order, in great Britain personal offences such as drunkenness, are judged by courts martial. In most other States the general rule is that soldiers even in time of peace, if on actual service, are judged by courts martial. In the case of complicity between a soldier and a civilian, sometimes one is judged by a military and the other by a civil court (e. g. in Germany, Switzerland and Spain), sometimes both by a military court (Belgium, Italy, Servia, Roumania, and Greece), sometimes it depends on the nature of the crime (e. g. in the United States, the United Kingdom, Finland, Holland and Portugal). A mixed tribunal judges them in Norway (a).

Scope of military law in war similarly extensive in all countries.

Jurisdiction in cases of civil offences in times of peace how ordered in different countries.

Trial of joint offence by soldier and civilian.

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(a) Article on "Military Law," by Sir John Scott in the *Encyclopedia Britannica*, 11th Edn.

## LECTURE XX

### OF LOCAL AND OTHER PUBLIC CORPORATIONS (a).

1. Corporations furnish an alluring subject of study to scholars of varied tastes. Does a corporation stand for a real or a fictitious entity? And if for a real entity, does it import personality? Is there a "group mind" of which the corporation is the body, or is the attribution to it of personality a legal fiction? These are some of the questions suggested by corporations which specially attract enquirers of a philosophical turn of mind. The progress of the corporate idea through the ages interests scholars of another type. Lastly there are "matter of fact" men who would deny that a corporation has either a body or a soul, or that its history or philosophy can have any scientific interest, seeing that a corporation is a purely human invention contrived to serve certain very practical objects which experience has shown can be best secured by it.

Corporations, as a subject of philosophical and historical study.

2. That the corporate idea has its root in both history and human psychology is beyond question. If at the present day, in our severer moods, we appear disposed to regard the personification of objects as the peculiar failing of savage men, or the special privilege of poets, it is also true that not even the most hard-headed of practical men among us can, in unguarded moments, avoid speaking of "institutions" as persons. Whether this is an unconscious recognition of a "group mind" permeating and lying behind the individuals of the group who constitute the body corporate is an enquiry into which I dare not enter. I just note the fact that we simply cannot help personifying institutions.

"Personality" of corporations.

3. Looking again at the matter historically we are assured on unimpeachable authority (b) that in certain ancient human groups (and the people whose administrative systems we are

Corporations, only "natural persons" in archaic society.

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(a) Special attention has been given in this lecture to municipalities (amongst public corporations) both because they are typical of the rest and also because the others grew up as more or less imperfect imitations of the corporations of communes.

(b) Maine, *Ancient Law*, Ch. V, and Sir Frederick Pollock's Note M. to Ch. VI. thereof.

Later recognition of individuals as legal persons, whilst corporate personality comes to be regarded as abnormal.

studying are descendants of one of or other of these), society was composed of families and not individuals, and that the only legal relations which were possible in those societies were those entered into by one family regarded as a corporate entity with another similar body corporate. It follows, therefore, that if by a "legal person" is meant one who may be the subject of rights and duties (a), the only "persons" known to law in those societies were family corporations and not the individual members thereof. These when they did begin to have rights of their own did so by way of exception, so that the lawyers of this era of transition, if they gave any thought to the matter, must have for a long time viewed the son or the slave when he came to claim his *peculium* as a legal anomaly—in fact as an abnormal artificial person. The individual did not become a subject of rights and duties until he had fully established his right to own property and make contracts in his own person. He did not, in other words, become a legal person until he had succeeded in destroying the corporate personality within which he was cradled and nurtured.

Corporations regarded as abnormal persons but not as mere creatures of the State in Roman law.

4. Leaving behind what may be termed the pre-history of law, and indeed long after the reversal of ideas by which individuals came to be regarded as "natural" and bodies corporate as "abnormal" persons, I do not find that Roman law ever regarded corporations as mere creatures of the State. The juristic personality of bodies corporate appears to have been recognised from the same natural necessity which compelled the recognition of the legal personality of the slave (b).

Feudal order forced to make room for communes.

I have, in a previous lecture (c), described the natural antagonism in the Middle Ages of the communes to the

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(a) Holland, Jurisprudence, Ch. VIII.

(b) "A corporate body always drew its existence directly from the act of the executive government or the legislature, though when the purpose of a corporate body was not among those classed as illegal, or was among those classed as legal, the act of authorisation was presumed." Sheldon Amos, *History and Principles of the Civil Law of Rome*, p. 122. The requirement of recognition by the State did not make corporations altogether creatures of the State any more than it did in the case of human beings. See Holland, *Jurisprudence*, 7th Edn., pp. 84-86.

(c) *Supra*, Lecture III (V), para. 5, Lecture III (VI) and Lecture VII, paras 8, 17.

feudal order and the process by which, in feudal times, the recognition of the corporate character of the towns and cities was in general forced upon the seigniors and the Kings (a). But the towns themselves had to submit to being partially feudalised in order to find for themselves a place in the prevalent feudal scheme of society. The recognition of their quasi-independent corporate character could only take the shape of grants from the Crown. As each charter was the result of individual bargaining between the town and the Lord, the charters followed no general plan and Medieval town charters thus presented the widest variety in their contents. From this to the affirmation that corporations are mere creatures of the State, that they have the capacity for rights and duties only by Royal sufferance, that, in other words, they are artificial persons—was not a long step. The idea that corporations could be called into existence only by a definite act of the State did not, according to Dr. Rashdall (b), gain ground in England till apparently the 15th century, but it appears to have been firmly established in the 16th. But even after this, the common law of England continued to bear traces of the true origin of local as of other corporations in the rules (i) that once accepted a charter is irrevocable by the Crown, and could only be extinguished by surrender or by some misconduct which would involve its forfeiture after a judicial proceeding (c); and (ii) that the Crown has, apart from statutory authorisation,

How communes came nevertheless to be regarded as artificial persons and as creatures of the State.

Common law prevents total absorption of communes in the State in England.

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(a) These were not the only corporations they were forced to recognise. There are in England to this day certain corporations which must have come into existence independently of any grant from the Crown. To fit them into the current legal theory that all corporations are creatures of the State, the English courts have resorted to the transparent fiction of a lost grant. The natural attitude of the towns towards the feudal order in the early Middle Ages is well expressed in a German couplet which Mr. William Harbutt Dawson translates thus :—

“No man’s lord and no man’s wight  
That is the free-born burgher’s right”.

—Dawson, *Municipal Life and Government in Germany*, p. 3.

(b) H. Rashdall, “The Universities and the Legislature” in 20 *L. Q. R.* p. 76 at p. 79. Mr. Freund is of a similar opinion, *Police Power*, p. 357. Adler, *Law of Corporations*, pp. 33-36.

(c) These are *scire facias* and *quo warranto*, as to which see Halsbury, *Laws of England*, Vol. X. “Crown Practice”.

no power to grant charters for a limited period of time (a). It was thus the English common law which helped to preserve the individuality of English towns and boroughs and prevented their total absorption in the State (b).

The progressive absorption of communes in the State on the Continent.

(i) In France.

6. But no such check opposed the progress of centralisation and absorption of local communities on the Continent. "At the close of the 13th century, the theory was established (in France) that the King alone had the right to create communes or consular towns, as he had the right to abolish them as a form of punishment or as an act of grace, as for example when they were bankrupt and unable to support municipal expenses." The system of administrative tutelage reached its zenith in the 17th century with the extension of the power of the Intendants. "A stone could not be removed or the expense of a sou incurred without the consent of this officer" (c). In addition to the systematic abolition of privileges, the State intervention showed itself in municipal elections, in the management of finances, in the administration of public affairs and finally in the complete abolition of municipal justice. The very offices of mayor and aldermen became hereditary and purchaseable. Forms and ceremonies only survived, and if people still clung fondly to these as to realities, it was not the interest of monarchy to destroy this vain shadow (d).

7. "The communal history of other countries", says Brissaud, (e) "is nearly the same as that of France". The story is repeated in Flanders, the Low Countries, Germany and Italy. While everywhere else, municipal franchises disappeared leaving no traces behind, the communes of England gave her a Second Chamber".

(a) H. A. Smith, *Law of Associations*, p. 132.

(b) A somewhat analogous result was worked out in America by the courts holding that the statutory charter at least of a private corporation is a contract which in the absence of express reservation cannot be impaired by subsequent legislation. As regards public corporations too, it has been held by the Supreme Court that the charter of such a corporation also cannot be so altered or repealed as to destroy substantial property rights which are independent of special privilege or corporate capacity or to divert them from their original purpose. Freund, *Police power*, Ch. XVI.

(c) Brissaud, *History of French Public Law*, pp. 255-256.

(d) *Ibid* pp. 414, 257.

(e) *Ibid* p. 255.

8. The process completed itself in Germany between the 16th and the end of the 18th centuries. "Step by step the governing power was wrested entirely from the hands of the citizens and the delegated councils and was exercised down to the minutest details by the central authority in the name of the ruler" (a). By the middle of the 18th century urban autonomy had virtually ceased to exist in most of the German territories. "If the local authorities were allowed to continue, they were deprived of power, were reduced to a condition of absolute subordination and were treated simply as committees for executing the orders of the sovereigns" (b).

(ii) In Germany.

9. The complete subjugation of the communes to the State in England was not effected by the Crown but by Parliament. The common law could stand between the King and the communes, but not between the communes and Parliament. No corporate charter, whether granted by the Crown or by Parliament, is irrevocable by Parliament. Parliament is free to grant charters for a limited period and in fact has authorised the Crown by statute to grant such charters (c). Corporations have thus come to be in very truth creatures of the State, now represented by an omnipotent Parliament. No conceivable theory of natural law could intervene to save for them the irreducible minimum of rights and privileges (d). Nobody could question the power of Parliament to grant or withhold charters or to grant them upon any term it pleased or for that matter to extinguish charters already granted. This lowering of the status of corporations in the eye of law is reflected in the canon of construction developed by the courts of law, according to which while a corporation created by common law charter can do every thing the charter does not forbid, a corporation created by statute can do only what the statute expressly or

Communes made creatures of the State in England by Parliament.

Strict interpretation of powers of statutory corporations.

(a) Dawson, *Municipal Life and Government in Germany*, pp. 6-7.

(b) *Ibid.*, p. 8.

(c) Statute 7. Will. IV and 1 Viet, c. 73.

(d) Maine has described how just at the moment when the dissolution of the Roman household was about to reduce the slaves (who had until then a status in the family not measurably inferior to that of the son or the wife under *manus*) into a chattel, the doctrine of natural law intervened to save for him the minimum of civil rights. Maine, *Ancient Law*, Ch. V.

impliedly permits (a). Municipal and other local corporations in England to-day are statutory bodies, and their powers should apparently be subject to the same rule of strict construction (b).

Subjection  
of municipa-  
lities to  
State legis-  
latures in  
America.

10. In the United States of America, before the revolution of 1776 town charters were issued by the Governors, and not by the colonial legislatures, apparently upon the request of burgeses or inhabitants and the charters were sometimes submitted to the latter for their acceptance before being put into operation. Under the regime of Royal charters, the American municipalities thus enjoyed almost entire freedom from legislative interference. But after the revolution municipal charters were granted, not by the Governor alone, but by the State legislature. In other words, the city charter became a statute which might be amended or repealed like any other statute. "This," says Professor Munro, "involved a radical change in the relation existing between the municipality and the State." "Under the new dispensation they were completely under the domination of the State legislature" (c).

(a) *Baroness Wenlock v. The River Dee Co.*, 36 Ch. D. 674, 685 (1883); *Ashbury etc, Co. v. Riche*, L. R. 7 H. L. 653, 691 (1875).

(b) Brice, *Doctrine of Ultra Vires*, 3rd Edn., pp. 191-2. *Contra* Adler, *Law of Corporations*, pp. 125-126. The last mentioned author thinks that the statutory powers of public corporations will, in the interest of the public, be more liberally construed than those of other corporations, *Ibid*, p. 28. The practice of the Courts however seems to confirm Brice's rather than the contrary opinion. Mr. Edward Jenks, in a paper which he submitted to the First International Congress on the Administrative Sciences held at Brussels in 1910, stated: "The slightest attempt to exercise a function which has not been actually conferred by Parliament would be immediately suppressed by the ordinary courts of law, as may be seen from the famous *Cockerton case* of the year 1900. It is true that in some of the old municipal boroughs which had enjoyed privileges for hundreds of years before the Acts of 1835 and 1882 were passed, there remain a few traditional powers which have never been conferred by Parliament, but the exercise of these ancient powers is regarded with extreme jealousy by the ordinary law courts; and it may be observed that the power of granting new municipal charters, accorded to the Crown by the law of 1882, is described in the Act itself as the power of extending to such a municipal borough and the inhabitants thereof the provisions of the Municipal Corporation Act. Any attempt by the Central Government to increase or diminish the function of a local authority altogether passes the imagination". G. Montague Harris, *Problems of Local Government*, pp. 205-206.

(c) Munro, *Government of American Cities*, pp. 3-6. The rule of strict interpretation has been held applicable to municipal corporations in America.

11. The conception of the relations of the State and the municipalities was thus at the end of the 18th and the beginning of the 19th centuries essentially the same in every one of the countries mentioned. The absolute legal subjection of the local corporations to the State has remained up to the present day unmodified in theory. The character and amount of personality possessed by local corporations in each of these countries are absolutely determined by the State in each of them. It is only in the method of such determination that the several countries mentioned now differ. It is administrative on the Continent of Europe, legislative in England and America. The difference in method, it will be presently shown, leads to important differences in the working of the municipalities.

Relations of State and local corporation at the end of the 18th century in Europe and America.

(i) General.

12. Broadly speaking, in England and America where the powers of local corporations are determined by statute, the freedom of the local bodies is restricted within express limits, but within these limits, they have considerable powers of self-determination. Indeed, the only real check upon their action, not merely in cases of abuse but even when they exceed their powers, is that which comes from the processes of courts of law. There has been until recently in England and there is still in America hardly any administrative interference with the action of local authorities, and the State has interfered, if at all, through legislation. The English and American local corporations are really not so much agents as licensees of the sovereign legislature free to act within the terms of their license but responsible to all persons affected for every breach of the law (a).

(ii) Special. In England & America.

Local Corporations, licensees of the legislature, not agents of the State.

13. On the Continent, on the other hand, the local corporations which, as shown above, had come to be regarded as mere agents of the executive government for local government purposes, have never ceased to be so regarded. The question

On the Continent agents of the Government.

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*Spaulding v. Lovell*, 23 Pickering (Mass) 71; Dillon, Law of Corporations, Vol. I, pp. 452-453. Read here, however, note (6) to p. 510 *supra* which partially qualifies the statement in the text.

(a) English law shows itself more reluctant than the American in regarding local corporations as agents of the Crown for any purpose whatsoever. In America, in certain matters, municipalities are regarded as agents of the State. See Munro, Government of American Cities, Ch. IV. Goodnow, Comparative Administrative Law, Vol. I, pp. 200-203.



Attitude of  
British  
Parliament  
towards local  
corporations.

of municipal reform on the Continent of Europe has never been, what powers of possible mischief the legislature may safely grant to the local corporations without possibility of serious abuse, but what powers of administration the executive government may safely entrust to the local corporations without injury to the general interests of the community and under what safeguards. To put the matter in another way, to the English Parliament, the local corporations (like the justices of the peace in the counties before 1888) are private persons to whom the legislature had perforce to entrust certain local functions the due performance of which could not be satisfactorily secured without local assistance. The powers thus unwillingly given are enumerated in some detail to prevent errors and abuse and are hedged round besides by severe limitations. Having thus laid down beyond all possibility of mistake the lines upon which these impressed accessories to the administration are to work, it deservedly feels that its own responsibility in the matter has, for the time being at least, ceased, and that if the corporations are to be kept within the limits of law and up to the mark, there are the law courts to do it. Unless the complaints against any corporation or class of corporations become so insistent as to require legislative re-adjustment, Parliament does not ordinarily interfere. American legislatures, for reasons which have been alluded to in a previous lecture, do not however exhibit the *laissez faire* attitude of the English Parliament towards local corporations. As has been already stated, this power of interference has been so often abused in the States of the Union, that many have proceeded to impose constitutional limitations on its exercise (a).

Of the State  
legislatures  
of America.

Why delega-  
tions of large  
powers to  
local corpora-  
tions on the  
Continent  
possible.

14. In Continental governments on the other hand, where local corporations have been habitually used as the agents of Government, the problem of municipal reform has never been complicated by any initial bias against delegation of large powers to the localities. The danger to be apprehended from large delegations of administrative powers has been the less there, because of the administrative subordination of local corporations to the executive government, which has been the outstanding feature of the relations of the State to local corporations on the Continent of Europe.

(a) See Lecture VII *supra*, paras. 34-36.

15. If we overlook, as we must, the one spasmodic effort to establish communal independence made by the Constituent Assembly in France in 1789, an attempt which died in its cradle, the first real law of municipal reform of Europe of modern times was Stein's Municipal Ordinance of Prussia of 1808. This measure, it must be remembered, was not a concession to a popular demand, for there was none (a). "The German people", says Mr. Dawson, "had been so completely dragooned by their multiplicity of petty autocrats and so thoroughly had they learned that the first duty of the citizen was to obey the ruling power that they did not in fact know that they wanted any liberty. When, after the debacle at Jena, Napoleon approached their towns, not only patricians and the populace but the very State officials and military officers received him at the gates". These events produced on the mind of the greatest Prussian statesman before Bismark the firm conviction "that Prussia's greatest misfortune was deprivation of liberty and that its only hope lay in its restoration". The new State, as Stein conceived it, was to rise, if at all, on the ruins of the old, by the united effort of the whole nation, and the nation was to be fitted for political duties and rights by being trained in the duties and rights of citizenship in the town and village, in the district and province. The idea which underlay his plans was a large decentralisation of State authority which was to add weight and importance to civic life without organically weakening the central power. The municipality offered itself to Stein as the most favourable field for cultivating the desired civic spirit (b).

The nineteenth century the era of municipal reform in Europe.

Prussian municipal reform, a gift of its Government to its people.

Motive of the gift, cultivation of civic spirit with a view to national consolidation against external attack.

16. Stein's first ordinance concentrated all authority in the town council to be elected on the principle of equal secret voting by the burgesses. The executive was not only to be elected by the council, but was to be entirely subordinate to it. The questions entrusted to the local authorities comprised

Stein's Municipal Ordinance of 1808.

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(a) Dr. Clauswitz points out that the literature of the time to which Stein's Municipal Ordinance fell "contains no indications that there was any active desire on the part of the citizens of our towns for a more effective share in the management of their affairs, and up to the present no evidence to this effect has been produced from the archives of the towns and the governments." "The reform," Mr. Dawson correctly observes, "was given from above." Dawson, *Municipal Life and Government in Germany*, p. 16.

(b) Dawson, *Municipal Life and Government in Germany*, pp. 12-14.

finance, taxation and loans, the care of the poor, of schools, and of public health and the right to acquire and hold real estate, but all judicial jurisdiction was withheld from them. Police function, which Stein wanted to confer on the local authorities, was on the objection of Stein's colleague Schon given to the municipal executive. That the power of the central executive should not be unduly depleted, and "lest (in the towns) a number of small republics should be created", a general right of "supervision" was retained by the Central Government. It was required that the appointments of "magistrates" or aldermen should be confirmed by the provincial authorities, whilst the chief mayors of the large towns were to be nominated by the Crown from lists presented by the towns (a).

Subsequent  
develop-  
ments.

17. The Municipal Ordinance of 1808 performed its beneficent work till 1831, when the hand of reaction again fell heavily on the towns. The Ordinance of March 1831 made the executive virtually independent of the council and indeed the predominant partner in the work of administration (b). The municipal council was in effect made bicameral with the right necessarily following in the Government of interfering between the two bodies in cases of conflict. The State claimed the right to appoint a commissary in the event of delay in appointing an officer needing its approval and also to dissolve any town council which "continually neglected its duty or fell into disorder or partisanship". The franchise was raised, and amongst other changes came one which became a permanent, and on the whole, a beneficent feature of German municipal organisation, viz: that requiring salaried members of the executive to be employed for 12 years and unsalaried members for 6 years, with option to extend the term of any of the appointments to a life tenure. An Ordinance of 1853 abolished Stein's principle of equal and secret voting and replaced it by the three class system, and the representative body was still further subordinated to the executive (c).

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(a) Dawson, *Municipal Life and Government in Germany*, p. 19.

(b) *Ibid*, p. 20. The Municipal Ordinance of East Prussia states generally that it is the duty of the executive to enforce the decision of the town council "in so far as it is in agreement therewith." *Ibid*, p. 83.

(c). Stein's ideas appear generally to have been very much in advance not only of those of his own times but also of any that has found acceptance

18. These later Ordinances have affected the organisation but not the powers of the local corporations. By the "constitutions" of the towns of Prussia, the local authorities are charged with the general administration of communal affairs so that whatever became at any time a "communal affair" fell *ipso facto* within the sphere of the municipal government. Questions of competence and disputes between communes and the supervisory authority are determined by administrative courts, with jurisdiction over all matters of local government. The Prussian Supreme Administrative Court's interpretation of the competence of municipalities appears quite clearly from the following decisions of that court. A decision of March 10, 1886, says: "No Prussian law sets definite limits to the activity of communes as such. The communes have a general right to promote the moral and economic interests of their members in so far as special laws may not prescribe definite exceptions. In the absence of such laws the boundary between the province of the communes and that of the State as the higher commonwealth is determined solely by local considerations, i. e. by the consideration that communal duties shall be of a local character. Whatever communes may do within their own province and with their own resources for the advancement of those interests, unless it is on principle forbidden, may be regarded as a communal affair." A decision of September 21, 1886, lays down: "The urban commune using its own resources may claim as falling within its sphere everything that promotes the welfare of the whole community and the material interests and intellectual advancement of the individual members. It can of its own accord establish any institutions and arrangements for the public good which serve this end. It has the general right to promote the moral and economic interests of the members and to use the resources available for the purpose, though always (and herein is the limit the transgression of which would consti-

Competence of local authorities in Prussia.

The Supreme Administrative Court of Prussia on the competence of the communes.

amongst the ruling body in Prussia during more than a century after 1808. "I regard it as important," he wrote to his colleague and future successor Hardenburg, "to break the fetters by which the bureaucracy obstructs all human movement, to destroy the spirit of avarice and pernicious self-interest and the attachment to mechanical forms which dominates this form of government. The nation must be enabled to manage its own affairs and to emerge from the condition of tutelage in which an ever restless and vigilant Government seeks to keep it." Dawson, *Municipal Life and Government in Germany*, p. 14 and Ch. I generally.

tute an infraction of the law) subject to the condition that it and its organs restrict themselves to the care and representation of local interests (a).

Local authorities in Prussia have all powers not expressly withheld from them by law in local matters.

19. Such an interpretation of the powers of the local authorities obviously reduces to the minimum the fear which perpetually haunts English and American municipalities that any new departure they may choose to make in municipal service may, after all the trouble and expense thrown on it, be nullified by courts of law pronouncing it to be *ultra viris* of the municipality. The interpretation, shortly stated, means that whereas under English and American law a local corporation may not be presumed to have any powers unless the same are expressly or by necessary implication conferred on it, the local corporations in Germany are presumed to have every power concerning communal affairs which has not been expressly withheld from them. It follows from this that local corporations in Prussia have no occasion to go up to the legislature with costly petitions for special powers. They have, subject to administrative supervision and sanction, all possible powers concerning local affairs.

Municipal reform in France.

Reconstitution of the communes by the Constituent Assembly in 1789.

Centralisation by Napoleon.

Reforms of 1831 & 1848.

20. In France, the Constituent Assembly of 1789 sought to rehabilitate communal life by establishing a bicameral form of municipal government, consisting of (1) a *corps municipal* composed only of the Mayor and several executive officers all of whom were to be elected; and (2) a body of notables elected for the exercise of deliberative functions, twice as many in number as the *corps municipal*. The two bodies together formed the Council General of the commune, the Mayor and his executive associates being in charge of the active work of the administration. The scheme went the way of most of the reforms of the Revolution, and in 1800, Napoleon made the Mayor, his executive associates and the councillors all appointive functionaries. A law of 1831 allowed a list of municipal voters possessing a modest property qualification to choose the members of the municipal council, whilst the still more liberal law of 1848 gave the council power to appoint officials from their own membership except in towns of greater population where appointments were left to be made by government from persons

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(a) Dawson, *Municipal Life and Government in Germany*, pp. 32-33.

designated by the council. The power to appoint its officers was however again taken away from the municipalities by the Second Empire and municipal government partially centralised. The Third Republic at first hesitated to introduce any radical reforms in the organisation of the municipalities. But whilst it retained the powers exercised during the Imperial regime, the spirit in which these powers were exercised showed a studied regard for the wishes of the localities. An Act of 1884 finally made a clean sweep of the old system and recreated the present day French municipalities and rural communes. The councillors are now elected by universal manhood suffrage and in turn elect the Mayor and his adjuncts from amongst themselves. According to established habit, the Mayor appoints all municipal officials and he and his adjuncts carry on the executive business of the commune and not the commune through them. More from habit than from necessity, the communal council retains its old advisory functions, and thus the bicameral character of the municipal organisation is substantially preserved.

Reaction in  
the Second  
Empire.

The Muni-  
cipal Law of  
1884.

The present  
organisation.

21. The Government still retains the power to suspend the Mayor who besides being the executive head of the municipality is also the agent of the Government, and by a decree of the President may suspend and even dissolve the entire municipal council, but in that case an election must at once be held to choose a new council to which the dismissed councillors are re-eligible. It is chiefly in his capacity as an agent of the General Government charged with the local execution of national laws that the Mayor is under the surveillance of the Prefect. But over and above this a large part of the important municipal work of the council and the Mayor requires for full validity the assent of the higher authorities (a).

22. The only other local corporations that need consideration for purposes of comparison in the present context are the communes of the Netherlands of Holland and Belgium. Of these, it has been affirmed that "each in itself is a miniature free state". They are very much less subject to administrative tutelage on the part of the central authorities than the municipalities and communes of France and Germany and therefore enjoy a larger measure of local autonomy in practice (b).

Communes of  
Holland and  
Belgium.

(a) Albert Shaw, *Municipal Government of Continental Europe*, Ch. II.

(b) At the first International Congress of the Administrative Sciences held in Brussels in 1910, the Belgian delegates complained that local autonomy had

Municipal reform in England.

Administrative control over English municipalities. Its real character.

The "grant-in-aid" system of control.

23. I have in a previous lecture traced the changes effected in the municipal system of England in the nineteenth century (a). The features of the present municipal law of England which are of the greatest importance in the present context are (1) that any local area which satisfies the requirements of a general statute may demand recognition as of right as a municipal corporation; and (2) that some measures of supervision and control have now been vested by statute in the Central Government. As to the character of the supervision and control exercised in pursuance of these powers, it has been asserted that these powers, amply sufficient as they appear on paper, are systematically flouted by the local authorities, with whom the right to govern themselves in just what manner they choose has become traditional. Practically the only power the central authority does feel up to exercising is by an occasional application to the law courts for a writ of *mandamus* in cases of patent neglect. "Where there is merely inefficiency, it can do nothing except hold inquiries, pillory the public authorities by publishing the reports of its inspectors and finally rely on the public opinion of the electorate to supply the desired stimulus" (b). But whilst coercive powers conferred by statute have thus signally failed, the Central Government in England has luckily stumbled upon a device which has enabled it in increasing measures to exercise the right degree of national supervision and control without offending the susceptibilities of local autonomy and without losing the

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come to be worshipped as a fetish in Belgium to the point of becoming a menace to individual liberty. This aspect of the matter will be presently considered. Harris, *Problems of Local Government*, pp. 98-99.

(a) *Supra* Lecture VII, paras. 13 *et. seq.* and Lecture VIII, paras. 11 *et. seq.*

(b) In the Minority Report of the last Poor Law Commission, the point is forcibly recorded thus: "Mandatory instructions from a Government office in Whitehall can be enforced only by cumbrous legal processes and they have proved in practice to give the Government little real power over recalcitrant local bodies. It is in vain that Parliament endows the Local Government Board with ample statutory powers—on paper—to compel typhoid-smitten Little Poddington to provide itself with a proper drainage system and water supply. Little Poddington flatly refuses or stubbornly neglects to do so. The Local Government, for all its paper powers of coercing little Poddington by *mandamus* or by independent action in default, finds itself practically impotent and hundreds of little Poddingtons retain to this day their primitive insanitation triumphantly." Quoted in Mr. Sidney Webb's Preface to J. Watson Grice's *National and Local Finance*, p. xi.

very real advantages of local initiative and local freedom to experiment. This consists in the offer by the Central Government to local bodies of financial aid for the maintenance of specified services in an efficient condition, such aid being liable to withdrawal upon the failure of the local authorities to satisfy the Central Government through its auditors and inspectors that the required level of efficiency is being maintained. Thus it is that, in the words of Mr. Sidney Webb, "The National Government, in the course of the past three quarters of a century, has successively "bought" the rights of inspection, audit, supervision, initiative, criticism and control in respect of one local service after another, and of one kind of local governing body after another, by the grant in aid of the local finances, and therefore of the local ratepayers, of annual subventions from the national exchequer". Mr. Webb has no doubt whatever that this system of financial control is superior to the Continental system which divides the entire range of municipal services into "obligatory" and "optional" services, the former of which the municipalities may be compelled to perform before any of the "optional services" by the local representatives of the central authority (a).

24. The organisation of local corporations in England is unicameral, and it is the municipal council which governs through its paid permanent officials. An English borough is an authority of enumerated powers, but within the powers granted to it, it is autonomous and free ordinarily from interference by the Central Government; and legislative interference with their constitution has never been such as to give grounds for complaint (b). The narrowly set bounds within which it can exercise its delegated powers no doubt hampers it in its work of local service, and if in this matter it has been outdistanced by German municipalities, this must be largely due to these restrictions. But the organisation itself is thoroughly sound and capable of development on quite healthy lines free from the danger of that bureaucratic domination which is still the bane of public and private life in Germany.

Character of  
local auto-  
nomy in  
England

(a) Grice, *National and Local Finance*, Preface, p. ix. See *infra*, para 33.

(b) Alterations in municipal constitutions can be obtained in England mainly by the procedure of Private Bill legislation, which in its essential features is judicial and leaves no room for lobbying or log-rolling.



Excessive legislative interference with the organisation of local authorities in America.

Remedies therefor.

- (1) Prohibition of special charters.
- (2) "Home rule" charters.

Which in effect gives courts authority to determine the competence of local authorities.

Suggested reforms.

- (1) Legislation by general charters

25. In America, as has been indicated before, the power of the legislature under the law to do what it pleases with the constitution of the municipalities has led to grave abuses, and the constitutions of several States have sought to check it by prohibiting the grant of special charters by the legislature. But the evils of forcing all municipalities to adopt the same general plan of organisation, irrespective of local differences, are so great (a) that the movement in favour of such limitation has given place to another which prohibits changes in municipal constitutions otherwise than with the consent of the citizens concerned. "Home rule charters", as these are popularly styled, whilst they avoid one kind of danger however incur another. A municipality can hardly be permitted to be a law unto itself without injury to the general interests of the community. A recognition of this fact has forced courts in "home rule charter" States to decide that municipal charter provisions cannot supersede the general State laws relating to police administration, election machinery, the administration of justice, the school system or any matters which are of more than purely local concern—the upshot of these rulings being to throw upon the courts, rather than upon the legislature, the determination of the question as to how far municipal autonomy may be infringed in the general interest (b).

26. Professor Munro is strongly of opinion that the special charter system, generally prevalent in America, with its heavy burden upon the time and temper of legislatures, and its premium on lobbying and log-rolling should be abandoned. Of the two alternatives to this method, (1) legislation by general charters and (2) the adoption of the Continental principle of full local autonomy subject to such reservations as the State may properly make in the interest of its own administrative

(a) In England where local bodies are organised by general statutes, the necessary variations in detail are obtainable by Private Bill legislation, the character of which I have previously explained. See *supra* Lecture VII, para. 35.

(b) William Bennett Munro, *The Government of American Cities*, Ch. VII: The situation produced by home rule charters in America approximates that on the Continent of Europe where the boundary between the powers of the General and Local Governments is determined judicially by administrative courts.

efficiency, he rejects the former as it only mitigates but does not eliminate the evil. There is much force in his contention that legislative control of city affairs must as a rule be amateurish and the interests of the cities themselves must suffer from the want of local knowledge on the part of the legislators (a). The American city, he complains, has in fact ceased to be what it once was, an organ for the satisfaction of local needs and has become a cog in the machinery whereby the State carries out its functions of government. One result of the defective organisation of the municipalities has been that some very important departments of what was once local service, e.g. that of the police, are being taken out of the hands of municipalities and placed under the direct administrative control of the State. The only remedy according to him is to replace legislative interference by administrative supervision, such as one finds in Continental Europe and which, he points out, has made some headway even in England. "A sharp distinction", he however goes on to add, "ought to be made between State administrative supervision and direct State control of municipalities. The latter, specially when the city is forced to pay the bills, is never popular and cannot be looked upon as affording a present solution of local problems." (b)

(2)  
Local autonomy coupled with central administrative control.

27. Mr. Sidney Webb, to whose instructive preface to Mr. Watson Grice's comparative study of "National and Local Finance" I have previously referred, brings out the contrast, in the relations of the local to the Central Government, between the system in force in England the United States and on the Continent of Europe by characterising them respectively as the grant-in-aid system, the system of anarchy of local autonomy and the bureaucratic system, and (being an acknowledged authority on the subject) has no hesitation in affirming that the grant-in-aid method hits the happy mean between the excessive central control which is represented by the Continental system and the absence of all such control represented in the American (c). But an English writer who has made a special study of German administration in all its bearings, Mr. William

Mr. Sidney Webb's comparison of the English, American and German systems and preference for the first.

(a) Munro, *op. cit.*, p. 72, In England this evil is mitigated by the process, effective but prohibitively expensive, of Private Bill legislation.

(b) Munro, *op. cit.*, p. 76.

(c) Grice, "National and Local Finance," Preface by Mr. Sydney Webb.

Contrary  
view of Mr.  
Dawson.

Harbutt Dawson, finds little matter for self-gratulation in the organisation and working of local bodies in England, and in his book on Municipal Life and Government in Germany enters a strong plea in favour of organising the English local corporations on the German model.

His comparison of English and German systems of local self-government favourable to the latter.

28. "The principal powers of English urban authorities," he writes, "are derived from general statutes of three kinds : (a) the Acts under which they are constituted, i.e., in the case of boroughs, their Charters and local Acts and the Municipal Corporation Act of 1882, and, in the case of unincorporated towns, the Local Government Act of 1894 ; (b) Acts assigning to them special administrative duties, as in regard to public health (principally the Public Health Act, 1875) education, housing, etc., and (c) a series of permissive or adoptive Acts relating likewise to specific matters, e.g., public libraries, baths, housing, etc., which may be applied at their option. Any powers which towns wish to exercise beyond those sanctioned by laws of these kinds must be acquired on their own initiative and at their own cost, by Private Acts (application for which is subject to the assent of the ratepayers as ascertained by town's meeting or by general poll) applying only to the authorities seeking them, or as regards certain questions, by Provisional Orders granted and by-laws sanctioned by government departments (i. e., the Local Government Board and the Board of Trade) after enquiry and subject to Parliamentary approval. An English local authority can exercise no powers whatever without sanction so derived, in each case, of a statutory or quasi-statutory character. In contrast to this rigid system of relementation, we see the local authorities in Germany possessed of autonomy to an extent unknown in this country. While our borough and urban councils can only exercise such powers as have been delegated to or conferred upon them, German town councils can do anything that seems necessary to the good government of their areas and populations, and acts and measures only become *ultra vires* when they are expressly forbidden or are in conflict with the general law. Certain general duties and powers are assigned to the councils by statute, but probably the greater part of the work done by the German municipal bodies is of a permissive character, and is done either in virtue of local statutes or by-laws obtained expeditiously by administrative sanction (i. e., the approval of the supervisory authority, and

without legislative procedure at any stage), or without outside sanction of any kind. ....No cost is incurred in obtaining these local by-laws though often conferring powers corresponding to those obtained by our local Acts of Parliament where long and tedious legal and legislative procedure, attended by the expenditure of thousands of pounds, may be necessary in this country."

29, "One effect of the English method," the writer goes on, "of imposing duties upon local authorities from without is that independent initiative on a large scale is impossible. Perhaps its greatest condemnation lies in the fact that it dooms to inaction the progressive authorities which would be only too ready to act vigorously upon a multitude of questions if they were allowed, yet are bound hand and foot by the paralysing doctrine that nothing can be done that is not expressly authorised by the law. If English local authorities have lagged behind those of Germany in such matters as town planning, poor law reform, the medical inspection of schools and the feeding of necessitous children, it is not their fault, but the fault of the system under which they work. It is not complimentary to our national sense of capacity that our local education authorities could not institute a system of medical examination of children or even provide play centres and other means of recreation for scholars during the holidays until special legislation had been passed to empower them so to do. In these and other matters, German local authorities could and did act on their own initiative, without the need of statutory powers, and hence they were able to anticipate us" (a).

Independent initiative, according to him, impossible in England, otherwise in Germany.

30. Mr. Dawson's indictment of English local administration does not stop here. "State supervision", he says. "is very real in both countries, yet on the whole active interference of the kind in Germany relates to minor matters; when it comes to large measures and undertakings the German authorities enjoy a degree of independence which with us is unknown. Certainly bureaucratic Germany knows no such concretion of administrative power as our many-sided Local Government Board. When one remembers that this department has the

English local government, according to Mr. Dawson, more bureaucratically controlled than German.

right to direct, control, and override the action of local authorities at so many points, to give or withhold assent not only to their acquisition of special powers but to their use of powers created by general statutes, to determine whether they shall be allowed to borrow and what they shall borrow for, to surcharge expenditure which has not been objected to beforehand, to force upon them its imperatives by means of the deprivation of grants of public money due, and in the last resort by the process of *mandamus*, and, added to all these, to scrutinise their doings by means of its corps of inspectors and auditors, one may well wonder if anywhere else in the world bureaucracy exists in so powerful and so highly concentrated a form." (a)

Local government ideals in Germany, according to Mr. Dawson.

31. One other passage from the same writer and the picture is complete. "The conception of self-government held by German towns is far wider than that which appears to satisfy English municipal administrations, for the old idea of the town as an independent republic is still vigorous and animates all endeavours after further liberty. The aims underlying these endeavours are the clear demarcation of the competence of local government and, most of all, absolute autonomy within that sphere" (b).

English local administration is in need of improvement, but not of Germanisation. Its defects.

32. The picture is plainly overdrawn, both as to the merits of the German system and the defects of the British. It does not by any means establish a case for a thorough Germanisation of the English system. But this is not to say that the English system is not capable of improvement. Without question, local corporations on the European Continent more nearly resemble natural persons in respect of their capacity for self-determination than English and American corporations. There is in Mr. H.A. Smith's interesting essay "The Law of Associations, Corporate and Unincorporate," a classification of associations under English law into corporate, quasi-corporate and unincorporate bodies. The expression "quasi-corporations", the writer notes, has obtained currency in recent years as a description of those societies "which are minutely regulated by special statutes without being formally created into corporations". The bodies usually grouped together under this head are trade unions, friendly societies, industrial and provident societies and

English local authorities artificial statutory bodies and not juristic persons in any real sense.

(a) Dawson, *Municipal Life and Government in Germany*, p. 387.

(b) *Ibid.*, p. 369.

registered working men's clubs (a). To students who proceed to study English and Continental local corporations side by side, the English local corporations appear to be little more than "quasi-corporations" as defined above, with this addition that they have been "formally incorporated" and thereby made capable of holding property and suing and being sued under a common name. They are really highly artificial statutory bodies, having scarcely any resemblance to natural persons.

33. The Continental local corporations on the other hand are persons, though persons under tutelage. But the amount and extent of this personality varies in different countries. Thus in France, in the sphere at least of municipal trading, the Council of State has evolved a "principle of *speciality*" which would limit the activities of the communes and other local corporations to the discharge of administrative functions only, so that their capacity outside these functions is limited to powers specially assigned by law. The doctrine of *speciality* is warmly attacked by many French publicists who claim that it legitimately applies to public institutions such as hospitals, bureaux for public assistance, universities and so forth, not to organs of general administration such as the State, the Departments and Communes which are entrusted with wide powers of administration within a definite geographical area—powers, that is to say, of providing for all collective needs which may arise therein. The Council of State itself, it seems, does not apply the principle with rigid consistency, for it admits the validity of industrial undertakings by municipal corporations in three classes of cases, viz., (1) where the undertaking is a monopoly and thus is not calculated to interfere with private competition; (2) when no private initiative is forthcoming for the particular service; and (3) when such private initiative is insufficient, imperfect or disadvantageous (b). In the same field of municipal industries, the doctrine of *speciality* has been accepted in theory in Belgium but not seriously applied in practice, the Central Government having on the whole allowed local authorities considerable latitude in engaging

Continental local corporations truly juristic persons but under administrative tutelage, the amount of their personality varying in different countries.

The principle of *speciality* limits corporate capacity in France.

Accepted, but not seriously enforced in Belgium; and unknown elsewhere.

(a) H. A. Smith, *The Law of Associations*, pp. 20-21.

(b) The rule and the exceptions taken together seem to justify the comment that the Council of State in formulating them have been strongly influenced by the Manchester school of economics.

Limitations on corporate capacity on the Continent due to the prescription of "obligatory services" and imposition of financial limitations.

These limitations how regarded on the Continent.

Senor Eduardo Valdivieso's analysis of Continental provincial authorities (other than those of Germany).

in such undertakings. The doctrine appears to be unknown in Austria, Hungary, Germany, Holland and Switzerland (a). In most of these countries however there are a number of "obligatory" services which must be carried out by the local authorities before they can raise any money for those which are voluntary or optional, and in regard to which only they are claimed to be autonomous, and as regards these even, a strict limit is imposed upon the amount of money which may be raised for the purpose, constituting by itself a very strong practical check upon the liberty of the local authorities, whatever may be the law or practice on the point of "speciality" (b).

34. The "autonomy" of the local corporations on the Continent, which has evidently made such a deep impression on Mr. Dawson, is not however regarded with excessive enthusiasm by many people who have lived under it. Dr. Redlich who cannot be charged with ignorance of either the German or the English system makes no secret of his preference for the latter (c). The testimony of Senor Eduardo Valdivieso, one of the delegates to the First International Congress of the Administrative Sciences held in Brussels in 1910 (who had made a special study of the self-governing provincial corporations of France, Belgium, Holland, Spain and Portugal), is as to the condition of affairs in those countries much more positive. In a paper on the subject which he read before the Congress, he wrote that one simple system obtained in all these countries, consisting as it did everywhere of (1) a delegate of the Central Government endowed with the superior authority in the politico-administrative sphere, (2) an assembly of elective origin representative of the province or department concerned, and (3) a committee formed out of this assembly to represent the latter when it is not in session and to act also as a consultative body. As to the working of this system, he says sarcastically that the laws of the several countries bearing thereon appear to be the work of a single legislator animated

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(a) Harris, *Problems of Local Government*, pp. 37, 61, 99-102.

(b) *Ibid.*, p. 38. Cf. the system prevalent in India of requiring local bodies to devote fixed portions of their revenues to particular objects, which the Decentralisation Commission recommended should be done away with, a recommendation which was accepted by the Government of India in its Resolution of 1918.

(c) *Vide* Redlich and Hirst, *Local Government in England*.

with the desire of suppressing every germ of autonomy in the provincial bodies and of absolutely subordinating their functions to the central authority". "The first limitation," he says, "placed on the development of the provincial councils and assemblies is that of restraining their right of meeting, only exerciseable twice a year, by requiring special application for power to hold extraordinary sessions. In the second place, all these bodies can be suspended or dissolved by the central authority and their resolutions suspended and revoked by administrative power on the initiative of the Prefect or Governor. Moreover, many of the decisions require, before they can come into effect, the approval of the superior authority, and lastly, no resolution of the provincial assembly can be carried out without the sanction of the representative of the State. This last rule is enough in itself to destroy every trace of individuality in the intermediate organisms and is certainly definite enough in all the statutes. The Governor is alone charged with the execution of the resolution passed by the council or the committee in Belgium. The actions of the province whether by way of claim or defence will be carried out by the committee at the instance of the Governor (Art. 124 of the Belgian Provincial Law). The Royal Commissioner in Holland signs all documents addressed to them and executes their decisions. In the matter of actions at law in which the province is concerned, he appears in court in the name of the States as plaintiff or defendant and the judgments of the court are pronounced and executed in his favour or against him (Arts. 30 & 33 of the Dutch Provincial Law). The President of the *Junta* in Portugal has to deliver to the Government on the day following each session a resume of the decisions adopted or an authenticated copy of their text. if the Governor requires it, he being obliged to communicate them to the Governor with a report as to those resolutions which he considers to be illegal or contrary to the public interest. (Portuguese Code, Art 48). The records of the proceedings of the Italian provincial councils have to be submitted in full to the Prefect and he can annul them within twenty days. The Prefect represents the province before the courts, presides at the sittings and signs the orders or documents which relate to the interests of the provincial administration (Arts. 181, 190 & 192 of the Law of the Administrative Unification in



Italy). In France, the Prefect accepts or renounces gifts or legacies made to the department, enters into contracts in its name, defends and represents it in all legal proceedings, prepares and presents the departmental budget and revises all its resolutions with a view, if he thinks fit, of suspending them or recommending the Government to annul them (Arts. 47, 53, 54 & 57 of the Law of 1871). And in Spain the Governor presides at the sittings and executes and suspends the resolutions of the provincial bodies for which purpose they have to be communicated in full within three days (Arts. 79 and 86 of the Law of 1882)" (a). The above observations, it should be noted, are made with reference to provincial corporations. The communes are freer, but not so free as to admit of any real differentiation in principle.

Limitations  
on the cor-  
porate capa-  
city of Ger-  
man local  
bodies.

35. As to local corporations in Germany, it is to be remarked that whatever freedom may be permitted to municipalities in matters of acquisition of property, town planning and industrial operations, and the many varieties of "social welfare" work by which they have distinguished themselves, there are, besides the "obligatory services" in regard to which they are simply mandatories of the Central Government, a group of important duties relating specially to public health, regulation of buildings, traffic etc., (for which English local authorities have full responsibility) which in most German States are reserved to the province of the police authority and hence of the Central Government. "The inconvenience of this arrangement," says Mr. Dawson "is lessened owing to the fact that the State usually delegates local police functions to the Mayor personally." But that this and other inconveniences of bureaucratic control are not lightly regarded by the local authorities themselves (who must know where the shoe pinches them) is clear from the persistent claims put forward by them to be allowed to control in their own right, and not merely in the person of the Mayor, the police arrangements in relation to such questions as public health, building regulations, traffic and the like, for a wider control over the administration of education which makes so large an inroad on local finance and for a relaxation of the obligation which now exists in Prussia to obtain the Government's consent before the local

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(a) Harris, Problems of Local Government. pp. 91-92.

income tax can be raised beyond the State income tax rates. Many towns, I am by no means surprised to learn, chafe also against the legal obligation to seek the Crown's or other sanction to the appointment of Mayors and members of the executive, and most towns, Mr. Dawson writes, would like to see the interference of the Government and its supervisory agents in general reduced to a minimum or abolished altogether (a).

36. One of the characteristic provisions of German municipal law, to which reference must be made in connection with the present discussion, is the prohibition imposed on the local authorities against "mixing in politics." The spirit of this prohibition is beautifully reflected in the decision of the Prussian Supreme Administrative Court that a communal authority which petitions Parliament for franchise reforms (b) strays into the forbidden domains of politics, and such petitions must therefore be rejected as unconstitutional. Even Mr. Dawson is constrained to regard this prohibition as an unnecessary restriction of the right of self-government, though he is still able to draw some consolation from the fact that in Bavaria, though party-political matters may not properly be brought into the council chamber, Government encourages the local authorities to make known their views on legislative questions, whether they border on politics or not (c).

German ban on politics in local administration.

37. I find it very difficult indeed to agree with Mr. Dawson's view that the undoubted progress made in municipal services in Germany is attributable to the "autonomy" enjoyed by the local authorities in Germany—an autonomy which is held and enjoyed at the pleasure of the Government and may be hampered or nullified at the will of the administrative authorities. The jurisdiction of the administrative courts to see fair between the local bodies and the central supervisory authorities is not sufficiently far-reaching to affect the general bureaucratic character of the administration. It is not to the system, but to the spirit in which it has been worked by the guiding authorities, that the success of German municipal administration, phenomenal as it has been in many respects, is really due.

The real cause of municipal progress in Germany, not the system but the common national spirit which has animated officials and non-officials alike.

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(a) Dawson, *Municipal Life and Government in Germany*, p. 369.

(b) The large towns of Prussia are notoriously under-represented in the State Diet. Dawson, *op. cit.*, p. 37.

(c) Dawson, *Municipal Life and Government in Germany*, p. 37.

So far from obstructing municipal activity in any important direction, the efforts of the local authorities have been willingly seconded by the local bureaucracy. The representatives of the Central Government in the localities being for most matters the final sanctioning or supervisory authority, reference to the Central Government has been necessary in but few cases, and the salvation of local government has been generally worked out by the local bodies and the local representatives of the Central Government working together. Animated by the same spirit of national advancement, officials and non-officials in Germany have on the whole found themselves in substantial agreement as to the main lines on which administration both central and local should develop. I have no doubt, however, that the moment fundamental differences begin to divide officials from non-officials, the boasted autonomy of local institutions will vanish into space, or establish itself as a reality by overthrowing the bureaucracy.

The English system transfigured by the spirit of progress has had equally satisfactory effect in New Zealand.

State socialism in New Zealand

38. That English local government need not Germanise itself to win the race of progress is convincingly proved by the example of New Zealand. The system there is the orthodox system but completely transfigured by the spirit of progress. That spirit, as in Germany, has possessed the central and the local governments equally. Nowhere in the British Empire has State socialism progressed by such rapid strides as in New Zealand. In 1872, a public trust office was established, which undertakes the duties of executor or administrator or trustees of estates. In 1869 was established a government annuities and life insurance office which has been exceedingly prosperous. Another flourishing State business is the post office savings bank established in 1867. The telephones in New Zealand have always belonged to Government. Depots have been established in some of the chief cities for sale of coal from State mines. There are Government experimental farms and a Government vineyard. The main thermal springs are owned by the Government and Government has bathing establishments in several places. The water power of rivers and streams is owned by Government. All hospitals in New Zealand are Government institutions. The Government of New Zealand is a money lender and it grants loans to local bodies, and advances to private individuals on first mortgage of land under freehold or leasehold titles. The Bank of New

Zealand since 1894 is a quasi-Government institution. In 1908, the New Zealand legislature consolidated into a comprehensive Monopoly Prevention Act statutes passed in the three previous years to deal with several phases of this modern evil. The labour and land legislations of New Zealand form chapters in social legislation by themselves. In one word, to the question, "Has organised society a duty to look after the physical and moral well-being of the members of society?", the New Zealand people through their Parliament have given an emphatic affirmative reply. Who need have doubts after this as to the possibilities which are latent in the English system of government? (a).

39. The authors of the monograph on New Zealand, from which the above facts are taken (one of them the Chief Justice and a former Premier of New Zealand) preface their account of "Local Government" with this profession of faith: "The educating influence and the training to self-control and to freedom are of as much importance as the unifying of a race or people by a strong central government. It is the local government that makes for liberty and trains the people to govern. New Zealand from its earliest times, has always had local government." It has two kinds of local government for country districts and two for centres of population. The former are counties and road boards (which latter are really smaller counties), and the latter boroughs and town boards (which latter are smaller municipal bodies suited to villages). The county is incorporate and is controlled by an elected council which in its turn elects its chairman. In boroughs there is a borough or city council and a Mayor elected not by the council but by the electors. The functions of the county councils are to make and repair roads, bridges and ferries, to look after sanitation, drainage, licenses of vehicles, fire prevention, lighting and harbour works where there is no harbour board, and the councils may also contribute out of their funds money for charitable institutions, local telegraphs and telephones, public libraries, mechanics' institutes, agricultural schools, rifle ranges, cemeteries etc. The functions of the borough councils are many and various. They have streets,

Local government in New Zealand.

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(a) Sir Robert and J. Logan Stout, New Zealand (Cambridge Manuals of Science and Literature), Ch. V.

drainage, lighting (gas and electric), trams, bridges, ferries, water-works, sanitation, water for motive power, fire prevention, workers' dwellings, markets, public libraries, museums, public gardens, etc., under their control. They may contribute funds for recreation, instruction, etc. More than one borough (as in Germany) has a theatre. The power of legislation by bylaws of both county and borough councils is extensive. Hospitals and charitable institutions are managed by special local bodies. There are also special river boards, drainage boards, harbour boards, water and supply boards, fire boards, etc., even rabbit boards. This multiplicity of local government boards is a true expression of the genuine English aversion to centralisation of functions, which in the mother country has been giving ground only recently before compelling reasons of economy and convenience. The authors state with justifiable pride that "up to the present time (1911) not a single charge of corruption or fraud has ever been made against any of our municipal bodies or any of their members". (a).

The internal organisation of local bodies as bearing on their autonomy.

40. To revert again to the question of local autonomy, the internal organization of the local bodies is in itself not without important bearings upon it.

(1)  
In England unicameral omnipotent councils.

41. In England, the practical work of local administration is done by able salaried officers forming in the greater towns a large and powerful hierarchy with the town clerk at the head, but each one of them is theoretically dependent upon the council or the several committees for direction in every matter and he can only act independently within the limits expressly laid down for him. From the first to last therefore the council as a whole is omnipotent in local government (b). The councils in fact reproduce within their own humble spheres the characteristics of the British Parliament.

(2)  
Separation of powers in America and Continental Europe.

42. In the United States of America and on the Continent of Europe the doctrine of separation of powers has permeated even the local administration. As in England, so in the United States, all the salient features of the central government have tended to reproduce themselves in the organization of local

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(a) Stout and Stout, New Zealand, Ch. IV. Sec. I. B.

(b) Dawson, *Municipal Life and Government in Germany*, p. 371. Lowell, *Government of England*, Chs. XXXIX, XL, XLIII.

bodies. Early in their history, the town councils in most of the States became double chambered and the Mayor was invested with the executive veto on the resolutions of the council. The power of appointing borough officials given to the Mayor was made subject to assent by the borough senate. For a time many of the offices came (as in the State governments) to be elective and thus became independent of control on the part as well of the Mayor as of the council. This division of powers did so much to paralyse municipal activity that Professor Munro's strictures upon it can scarcely be regarded as overdrawn (a). The evils of the system have not unnaturally led in recent decades to a reaction in favour of unification of powers and responsibilities, a movement which, it may interest political psychologists to note, is contemporaneous with another in favour of unifying the National Government itself. Suggestions have been heard in favour of making the mayor a dictator for the term of his office, though they evoke as little general enthusiasm as similar proposals to confer temporary dictatorship on the President. But the scheme which has found most favour and has also been given practical operation in a number of States is the one which goes by the name of "the Galveston plan". The idea underlying it is to hand over the administration of the city to a single elected board of five persons, in whom are vested all legislative and administrative functions. "Home rule charters" and the "Galveston plan" of running municipalities by a board of commissioners are the latest contributions to the practice of municipal administration by the United States (b).

(a)  
In the United States bicameral council and executive veto.

The Galveston plan of unifying all authority in a small board of non-party businessmen.

43. We have seen that in France the Constituent Assembly's scheme of local administration, in 1789, provided for a bicameral organisation, the executive being clearly separated from the local assembly whose functions were confined to deliberation only. At the present day, in the department, the Prefect is an appointee of the Government and he appoints the departmental officials. In the commune, the Mayor and his adjuncts are elected but, being required to discharge central functions as well, are liable to be sus-

(b) In France, separation of executive and deliberative functions.

(a) Munro, Government of American Cities, pp. 7-8, 14-16.

(b) Munro, Government of American Cities, pp. 21-23.

pended by the Government (a). Neither the provincial nor the communal local assemblies have any real direction of the local administration. They pass resolutions which become executory when approved by the Prefect or the Mayor. The permanent deputation of the provincial council and the councillors themselves are thus in the main consultative bodies (b). In recent times, the tendency has been towards increasing the power of the representative bodies with the consequence that "in general", in the department at least, as stated by Mr. Lowell, "in matters falling within its province, the general council cannot do everything it wants, but can prevent almost anything it does not want" (c).

(c) In Holland, Belgium, Austria, Hungary and Switzerland, balance in favour of council as against executive.

44. In Holland, Belgium, Austria, Hungary and Switzerland, apparently the balance is already so far on the side of the representative bodies that deadlocks arising out of a conflict of aims and purposes between the assembly and its executive are rarer, and their autonomy therefore suffers less from internal conflict than in France and the United States (d).

In Germany.

45. The peculiarity of German local administration has been claimed to lie in a combination of the bureaucratic and technical elements with the elective and in the balance between central control and local government. I have already given reasons derived from an examination of the relations of the local to the central government for holding that the balance strongly inclines in favour of the latter. But this inclination is made positively decisive by the predominance of the permanent professional over the lay element in the executive and the independence of the executive of, and even

Predominance of the permanent professional over the representative body.

(a) Continental advocates of local autonomy criticise this employment of the local executive to discharge central government functions as providing a handle to the bureaucracy to dominate the local administration and they urge the appointment of separate officials to perform these latter functions. See Harris, *Problems of Local Government*, Ch. VII.

(b) Shaw, *Municipal Government in Continental Europe*, Ch. II.

(c) Lowell, *Governments and Parties in Continental Europe*, Vol. I, p. 39.

(d) Shaw, *Municipal Government in Continental Europe*, Ch. III, as to Holland and Belgium, and as to all, Harris, *Problems of Local Government*, Ch. VI.

predominance over, the representative body (a). Mr. Dawson is of opinion that local administration under modern conditions cannot fulfil its duties and thrive unless well-conceived policies of the administration are carried out steadily and continuously by a body of experts not removeable from office and uninfluenced by the wavering favour of a fickle electorate and that the driving power which municipal efforts have exhibited in Germany (contrasted with its feebleness in England) is due to the fact that these conditions of successful municipal administration which are wholly wanting in England are fully satisfied in Germany (b).

46. There may be a considerable measure of truth in this statement, and one may indeed go further and say that the success of municipal administration in Germany during the last half-century, in so far as this may be judged by visible results, would have been even more decisive, could it have been left entirely to be worked out by experts without interference, however well-meaning, by representative bodies or others of the lay public. But as I have pointed out elsewhere the association of the lay public in the active work of the administration was deliberately planned and executed by her best statesmen in the firm conviction that bureaucracy without popular control defeats its own end. Thus it is to the credit of what at one time was the most bureaucratic of existing governments, that more than once, just at the right time, it was able to discern the dangers of overcentralised officialism and moved deliberately forward to qualify it by popular control. Looking at the matter from this point of view, local bodies in England, in regard to internal organisation, occupy qualitatively a place superior to that of their Continental congeners.

Why notwithstanding its manifest superiority in visible results German local administration is inferior to English.

47 "What after all", asks Mr. Dawson, "is the essence of free self-government? Not necessarily direct government by the people in all details, for such an arrangement is in practice impossible. The essential thing is that the will of the people shall be done with its knowledge or at least with its acquie-

The essence of self-government.

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(c) Compare the organisation of the Central Government. Here too, are reproduced in the local bodies the characteristic features of the Central Government.

(d) Dawson, *Municipal Life and Government in Germany*, pp. 71-75.



scence, that it shall be free to say how and by whom its will shall be executed, and hence to give or withhold administrative powers at its option" (a) Mr. Albert Shaw, an American writer, speaking of the German system says: "However peculiar in a hundred details the German system may be, it is like the English and the French systems in the main fact that the voters elect a representative common council of considerable size and sitting in one chamber, which has in its hands for exercise directly or indirectly the whole authority that exists in the municipality" (b). When one is bent upon discovering resemblances one is apt to lose sight of differences. The comparison here drawn is scarcely fair to the English system. Were it at all just, the municipal administration of Germany, considering the results, would have been in every way superior to the English. But it is not. Both writers have been powerfully impressed by the visible results of German municipal enterprise and both have persuaded themselves that the German organisation of local administration must therefore be superior. I cannot help thinking that they under-estimate, if they do not indeed overlook, the danger which must be inherent in all systems which permit the people to shirk their part in the administration and cast upon the officials the whole burden of government, for that way lies bureaucracy. The system which helps the general public to take an active and continuous interest in their local institutions must, I think, be qualitatively superior to any which merely shows better results from the point of view of efficiency in performing municipal services.

The personality of local corporations in India.

48. It might be difficult for one who has been comparing types of local corporations in Europe and America to determine exactly the amount of personality possessed by the municipalities and rural boards in India. Except the municipalities of the three Presidency towns, which have experienced something approaching an organic growth, the other local corporations are all deliberate creations of the ruling executive. If these corporations have not yet attained any appreciable measure of local autonomy it is certainly not owing to any failure by the ruling authority to apprehend the true principles of local self-government. In Lord Ripon's Resolution on local self-govern-

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(a) Dawson, *Municipal Life and Government in Germany*, p. 373.

(b) Albert Shaw, *Municipal Government in Continental Europe*, p. 309.

ment, of 1882, is reproduced with approval the following extract from a circular letter shortly before addressed by the Government of India to the Local Governments.

40. "Special attention will be required in settling the relations between the various local bodies and the officers of the general administration and in providing for a certain measure of control and inspection on the part of Government. It would be hopeless to expect any real development of self-government if the local bodies were subject to check and interference in matters of detail : and the respective powers of Government and of the various local bodies should be clearly and distinctly defined by statute, so that there may be as little risk of friction and misunderstanding as possible. Within the limits to be laid down in each case, however, the Governor General in Council is anxious that the fullest possible liberty of action should be given to local bodies." "The control of the central authority," it was distinctly stated in the Resolution, "should be exercised from without rather than from within. The Government should revise and check the acts of the local bodies but not dictate to them. The executive authorities should have two powers of control. In the first place, their sanction should be required in order to give validity to certain acts, such as the raising of loans, the imposition of taxes in other than duly authorised forms, the alienation of municipal property, interference with any matters involving religious questions or affecting the public peace and the like. In the second place, the Local Government should have power to interfere either to set aside altogether the proceedings of the board in particular cases, or, in the event of gross and continued neglect of any important duty, to suspend the board temporarily, by the appointment of persons to prosecute the office of the board until the neglected duty has been satisfactorily performed. That being done, the regular system should be re-established, a fresh board being elected or appointed". For the exercise of these powers of control, it did not at the time appear necessary to the Governor General in Council, that the chief executive officers of towns, sub-divisions and districts should be chairmen or even members of the local boards, and he was of opinion that it would be more convenient that they should supervise and control the acts of those bodies without

The ideal embodied in Lord Ripon's Resolution of 1882.

taking actual part in their proceedings, and that so long as the chief executive officers were, as a matter of course, chairmen of the municipal and district committees, there was little chance of those committees taking any real interest in local business. "The non-official members," the Resolution said, "must be led to feel that real power is placed in their hands, and that they have real responsibilities to discharge".

Not realised  
in practice  
outside Presi-  
dency towns.

50. The ideal embodied in this Resolution has not been realised in practice, and in 1909, the Decentralisation Commission in effect endorsed the complaint that owing mainly to the failure to develop the principle of election and the appointment of official presidents, coupled with inadequacy of financial resources, the rural boards had practically become a department of the Government administration, their work being done by the official element within the boards themselves or by Government departments at the board's expense. As regards the municipalities other than those of the three Presidency towns, though their financial resources were ampler than those of the rural boards, it appears from the Report of the Commission that the excessive financial control exercised by the central authorities, coupled with an inadequate development of the elective principle and the practice (which is very general) of appointing official chairmen, has reduced them also to the position of agents of the Government to a slightly less extent only than the rural boards. (a). The Decentralisation Commission nevertheless found themselves unable to recommend "the dissociation of the Collector and his assistants from the work of the rural boards, though at the same time they "insisted on the predominance of an elected non-official

(a) The number of municipal councillors in India in 1913-1919 were 9753, of whom 51 per cent were elected, 81 per cent. nonofficial and 88 per cent. Indians. Of chairmen of municipalites, 67 per cent. were elected and 60 per cent. officials. The members of the rural boards numbered 16,862, but of these only 37 per cent. were elected ranging from 71 per cent. in the Central Provinces to 17 per cent. in Madras. 23 per cent. of the members were officials and 93 per cent. Indians. In all provinces except the Central Provinces (excluding Berar) the chairman of the district board was the Collector or Deputy Commissioner, and in the great majority of sub-district boards, the chairman was usually an official. See article on "Local Self-Government in India" by Sir H. Wheeler in the Journal of the Society of Comparative Legislation, New Series, No XXXIV, pp. 153 164.

element". But they thought that the same arguments which led them to recommend official presidents for rural boards did not apply in the case of municipalities, the circumstances of which differed from those of rural boards in that they were much less connected with the general district administration, that political education had reached a higher level in towns and that their jurisdictional area was much smaller and more compact. In its Resolution on local self-government, of 1915, the Government of India accepted the recommendation of the Commission that both municipal and rural boards should ordinarily be constituted on the basis of a substantial elective majority and that the nominated members should be limited to a number sufficient for the due representation of minorities and official experience. The Government also agreed with the Commission that the municipal chairman should usually be an elected non-official, though discretion should be reserved to Local Governments to nominate a non-official as chairman. It also agreed that the chairman of a rural board should as a rule be an official, though it had no objection to the retention of a non-official chairman where one existed or to the appointment of a non-official chairman where a Local Government or Administration desired to make the experiment. The Government in the Resolution further expressed itself in favour of allowing local bodies more ample control over budgets and freer power of re-appropriation, to concede increased authority to local bodies over establishments and to relax existing restrictions in regard to outside sanction for expenditure on works of importance. The Resolution finally shows the Government of India to be in sympathy with the recommendation of the Commission to constitute self-governing village organisations "possessed with certain administrative powers, with jurisdiction in petty civil and criminal cases, and financed by a portion of the land cess, special grants, receipts from village cattle pounds and markets and small fees on civil suits," supplemented where necessary by "some form of permissive taxation"; and there is at this moment before the Bengal Council a Village Self-Government Bill to give practical effect in Bengal to this last idea (a).

Changes contemplated in the Resolution of 1915.

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(a) The Government of India Resolution of 1918, which appeared after the above was written recommends a substantial increase of the present elective element among the members of municipalities and rural bodies,

51. As regards the municipalities of Presidency towns, the following description taken from the report of the Decentralisation Commission (a) will suffice for my present purpose.

Presidency  
municipali-  
ties of  
Calcutta  
Bombay and  
Madras.

52. "The Presidency municipalities of Calcutta, Bombay and Madras are of older date than the other municipalities of British India, and the first beginnings of local self-government in these towns go back to the 17th and 18th centuries. They are now governed by special Acts, which lay down the functions of the municipal councils, or corporations as they are here styled, and prescribe the taxation they may levy and their borrowing powers. The resources and powers of these bodies are much larger than those of any district municipality.

Constitution  
of corpora-  
tions.

53. "These corporations contain a proportion, which amounts to one-half in Calcutta and Bombay and is somewhat larger in Madras, of members elected by the rate-payers, while some of the other members are chosen by special bodies such as chambers of commerce and trades associations, and in Bombay, also by justices of the peace. Each corporation has a statutory standing committee (one third of its members being nominated by Government in Calcutta and Bombay) which is the determining and sanctioning authority in respect of a number of matters. In Calcutta and Madras the municipal chairman is appointed by Government; in Bombay he is elected by the corporation, but the executive administration is vested in a commissioner nominated by Government. The chairman in Calcutta and Madras and the commissioner in Bombay can, however, be removed from office by a vote of the corporation,

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representation of minorities by nomination, and the securing of official experience by nomination of officials without the right of voting. The franchise, it is further proposed, should be low enough to obtain constituencies representative of the body of ratepayers. Local bodies are generally to be allowed to impose taxes up to the maximum prescribed by law, to have a free hand in the preparation of budgets and, except as to certain specified appointments, full control over their employees. Ordinary municipalities except in special cases are to have elected non-official chairmen, while for the large cities the Bombay system of an elected chairman with a nominated commissioner is recommended. Finally, this Resolution deals with Panchayets which it is proposed shall have charge of village sanitation, village education and have jurisdiction in petty civil and criminal cases. See also the Joint Report on Indian Constitutional Reform submitted to Parliament by Mr. Montague and Lord Chelmsford, paras 192-197.

(a) Decentralisation Commission's Report, pp. 284-285.

provided such vote is carried by a majority considerably in excess of one-half the total number of members. These officers are usually experienced members of the Indian Civil Service, and the Government fixes their pay, subject, in Bombay, to maximum and minimum rates of salary prescribed by law. Calcutta has also a deputy chairman and a vice-chairman, the former appointed by Government, the latter by the corporation subject to the approval of Government ; while the Bombay Act provides for the appointment of a deputy commissioner by the corporation, subject to the confirmation of the Local Government.

Executive  
officials.

54. "The chairman in Madras and Calcutta and the commissioner in Bombay have certain executive powers of their own: in respect to other matters they must get the sanction of the standing committee, while in others again they have to get the sanction of the corporation.

55. "The Calcutta and Bombay corporations are allowed very full discretion in the ordinary work of municipal administration. The Local Government does not pass the budgets of either body, or interfere with its liberty of regulating taxation within the provisions of the law. In Calcutta, however, Government sanction is required to the execution of works costing more than a lakh or rupees.

Large powers  
allowed to the  
Calcutta and  
Bombay cor-  
porations.

56. "As regards the municipal personnel, the sanction of Government is necessary, in Bombay, only in regard to the appointment of the engineer and the health officer; and in Calcutta to the appointment of these officers, and to the salary of any other employee who may draw more than Rs. 1,300 a month.

57. "The control of the Local Government over the Madras municipality is far more stringent. Its budget and any deviation therefrom require Government sanction, as does also the levy of municipal taxes. Various sections of the Municipal Act give the Local Government control in regard to the exemption of areas from water, drainage or lighting rates, the construction of water-works, the acquisition of land for street improvements, etc.

Relatively  
stringent  
control in  
Madras.

58. "The Presidency Municipal Acts necessarily reserve to Government the power to require or provide for the efficient discharge of any service which may be grossly neglected."

The present position of local corporations in India.

59. From the above account it will appear that outside the Presidency towns and to a considerable extent within them, local autonomy in India still exists in the region of unfulfilled expectations. The Government of India Resolution on local self-government, of 1915, says that the changes recommended in the Resolution "will mark a real and immediate extension of the principle of local self-government." When these changes will have materialised, the autonomy of the local corporations will to a certain extent approximate that of local authorities in England. As things stand, however, the local bodies of India are on the one hand creatures of statutes like those of Great Britain and America and are on the other subjected to official control and interference like those on the Continent of Europe by reason both of their relation in law to the Central Government and their internal organisation. It is, however, only due to them to note that whatever may be their internal organisation and their relation to the central authorities, they are (such as they are) bodies corporate by statute, capable of holding such property as they are allowed to hold by law, of entering into such contracts or other legal relations as they are authorised to do by their constitutions as determined by statutes, and of suing and being sued in courts as bodies corporate (a).

Need for protecting individuals from encroachment on their right even when fully representative corporations.

60. The fact that local bodies are representative does not necessarily obviate the necessity of protecting individuals from abuse of authority by such bodies. The danger of those in the minority suffering from the majority abusing their powers is generally greater in small communities than in the State at large. The Belgian delegates to the first International Congress of Administrative Sciences did indeed complain that, in that country, communal independence had come to be worshipped as a fetish, that although there was judicial remedy against clear breaches of the law by the communes, there was none

(a) Cf. Sec. 29, Bengal Municipal Act. III B. C. of 1884, and Bengal Local Self-Government Act. III B. C. of 1885, sec. 20 (for Bengal), Reg. V of 1886, sec 15 and Reg VI of 1886, sec. 10 (for Ajmere), Beng. Act V of 1876, sec. 31 (for Assam), Bom. Act III of 1901, secs. 20-22 and Bom. Act I of 1884, sec. 9 (for Bombay), Mad. Act IV of 1884, secs. 8, 12 (i), 21 and Mad. Act V. of 1884, sec. 27 (for Madras), U. P. Act I of 1900, sec. 17 and U. P. Act III of 1906, sec. 12 (for the United Provinces), Act XX of 1891, sec. 13 and Act. XX of 1883, sec. 16 (for the Punjab)

against abuses of legal power (a), Belgium (like England) not having any administrative courts. There was, on the other hand, universal acknowledgment at the Congress of the beneficent activities of the administrative courts of France, notably of the Council of State, in keeping local authorities within not merely of the letter but also of the spirit of the law. The Council of State exercises in France a sort of Pretorian power in adjusting differences not only between the Central Government and the local authorities, but also between the latter and individual subjects, in accordance with the canons of equity and public policy. The Council of State, it was also acknowledged, was the only administrative tribunal in the world whose decisions have attained the rank and prestige of positive law, whilst the administrative law of most other countries was still in its infancy and more or less amorphous. The French Council of State, moreover, has power which no other court has of annulling administrative acts of local as of central authorities which are in excess of their competence, although nobody may have suffered pecuniary damage therefrom. Any one who has suffered pecuniary harm from such an act may after the same has been annulled proceed against the offending authority in the usual way for damages. Again, although ordinarily only the legality and not the expediency of an administrative act is reviewed in accordance with this special procedure by the Council of State, the principle of *detournement du pouvoir* is available to remedy cases also of grave abuse of authority.

Complaint from Belgium which like England has no administrative courts.

Commendations of the administrative courts France, specially of the Council of State,

61. There are administrative courts in Germany also to decide conflicts between local authorities and the Central Government on the one hand and local authorities and the people on the other. Administrative courts on the French model have been established in Italy also. Details of the administrative courts of all these countries do not call for consideration in the present lecture (b).

Administrative courts in other countries.

62. I have previously shown that English and American local corporations are very imperfectly endowed with the attributes of personality as regards the character and extent of the powers they are legally competent to exercise. The fact

Subjection of local corporations in England and America to judicial control,

(a) Harris, *Problems of Local Government*, p. 99.

(b) See *Infra*, Lecture XXIII.



When corporate acts or acts of its officials liable to attack as *ultra vires*.

however that their powers are minutely laid down by statute and that they exceed those powers at their risk makes them subject to more than the fair share of judicial control to which any person natural or corporate is subject under the law. Their imperfect corporality, in other words, lays them open to action in courts of law in a greater measure than would be the case, were they persons in a fuller sense. Their acts may be challenged as *ultra vires*, where similar acts by persons not so rigidly statute-regulated would not be, in similar situations. Again, discretionary duties with the performance of which they are charged, they may not get done through agents, for corporations may not delegate other than ministerial functions to their agents or servants, and discretionary acts vicariously performed will be open to attack in courts of law as unauthorised (a). Their ordinances are liable to be set aside not only on the ground of their being *ultra vires* but also on the ground of their being unreasonable (b). It is, however, some relief to know that in America a City council is not liable to civil prosecution either for the non-exercise of the powers of subordinate legislation given to it by statute or for the manner in which it has exercised them (c). But this of course does not save acts done in execution of ordinances not legally made from the vice of nullity.

Permissive & mandatory duties of local corporations.

63. Again, the legislatures in England and America, if they are constitutionally niggardly in the grant of powers to local corporations, are quite liberal in charging them with duties, and the courts will sometimes read a power couched in permissive language as being mandatory in intention (d). A public corporation may be compelled to perform such obligatory duties by *mandamus* or other similar judicial proceedings.

Liability on contracts.

64. "In matters of contract a local corporation is subject to substantially the same rules as are applied to individuals or to private corporations. A suit that can be successfully prosecuted against an individual can on the same essential

(a) Munro, *Government of American Cities*, p. 84.

(b) *Ibid.*, pp. 86-89, Adler, *Law of Corporations*, pp. 67-70.

(c) Munro, *op. cit.* pp. 92-3.

(d) *Ibid.*, p. 83, *Re v. Hastings Corporation*, 1 Dow. & Ry. 148 (1822).

facts be prosecuted against a municipality. In an action for breach of contract, the city can urge only the same pleas and defences that are open to an individual defendant ; it has no immunities by reason of being a public corporation" (a). A defence which American courts (differing herein from English courts) permit public corporations to take in actions for tort, that the act in question was done in the discharge of some governmental function is not available even in America when the contract has been entered into for a governmental as distinguished from a commercial purpose, and the degree of liability for the breach is the same (b). But a municipality may set up the defence that the contract entered into was outside the scope of its chartered powers or that it was not made by its proper officer or agent, and sometimes even on the ground of informality (c).

65. The corporate character of English municipalities exposes them to actions for torts committed by them or their agents acting within the scope of their authority. For no purpose (and at this point English law differs from American) is an English local corporation regarded as an agent of Government and in no case can it claim immunity for the acts of its agents on the ground that the latter are like themselves agents of Government (d). For the wrongful acts of its agents, *Pearlton v. London & South Western Railway Co.* (e) is generally regarded as having laid down that the corporation is not liable, if the wrong complained of was *ultra vires* of the corporation itself. But Mr. H. A. Smith in his essay previously cited (f) has cogently argued that the case is authority only for the proposition (applicable alike to corporations and to natural persons) that where authority which is admittedly not express cannot even be implied there is no liability. In the recent case of *Campbell v. Paddington Corporation*, (g), it has been held that a corporation will be liable for acts essentially *ultra vires* if express authority to commit it can be

Liability for  
torts.

(a) Munro, Government of American Cities, p. 91.

(b) *Ibid.*, p. 91.

(c) *Young & Co. v. Royal Leamington Spa Corp.*, (1883) 8 A. C. 517.

(d) *Penny & Wimbledon Urban Council* (1899) 2 Q. B. 72.

(e) L. R. 2 Q. B. 534 (1867).

(f) Law of Associations, p. 56.

(g) (1911) 1 K. B. 869.

clearly shown ; and this although *Poulton v. London & S. W. Railway Co.* (a) was cited as authority for the opposite view. "It is", according to Mr. H. A. Smith, "at the present day probably true to say that corporations have been successfully sued for every kind of tort (including those where malice or wrongful intention must be proved) for which an individual could be held liable" (b).

Immunity of local corporations in America for torts committed in the performance of governmental functions.

66. American law courts have found for local corporations immunity in respect of damages caused by their officers and employees when engaged in purely governmental work, as distinguished from what are regarded as their commercial or private undertakings. The ground of immunity is diversely put as (1) depending upon the principle that in so far as it is called upon to discharge governmental functions, it is entitled to governmental immunity ; and (2) that the officials who were directly responsible for the acts were agents not of the corporation but of Government. The former ground would obviously relieve the corporation of liability even when the act was directly authorised by a resolution of the corporate body, which however would not be the case if the latter was the correct basis of the claim for immunity (c). I have in a previous lecture pointed out that a clear test for determining what functions of a municipality are governmental and what not, has yet to be found (d) and the law as to municipal immunity in respect of governmental acts is at this moment in the greatest uncertainty in the States.

Prof. Munro on the powers and responsibilities of American municipalities as compared with those of European cities.

67. Professor Munro in concluding his survey of the powers and liabilities of the American city (as compared with those attaching to the cities of Europe) says that he has little hesitation in pronouncing both to be too narrow.

68. "In the first half of the 19th century broad grants of power to municipalities were very common, but this practice was in due course abandoned, and in more recent years legal restrictions have greatly hampered the cities of the United States in the performance of their logical functions of local administration. Legislatures and courts have been at one in

(a) L. R. 2 Q. B. 534 (1867).

(b) H. A. Smith, *Law of Associations*, p. 69.

(c) Munro, *Government of American Cities*, pp. 92-95.

(d) *Supra*, Lecture VII, para. 37.

their reluctance to allow the municipal corporation that free scope which it enjoys abroad. This attitude of mistrust has had a depressing effect upon the city government, and has undoubtedly led to the half-heartedness with which municipal authorities too often undertake the performance of their duties. Moreover, the policy of so carefully guarding the municipal corporation from civil liability for the improper performance of its public or governmental functions has not improbably contributed to the popular palliation of negligence and inefficiency. In the cities of France and Germany, where an aggrieved individual may bring suit in the administrative courts and mulct the municipal treasury for the negligence or the incapacity of any city officer, no matter what his sphere of employment, the premium thus put upon care and efficiency has been a salutary factor in securing high standards in local administration. A wider range, both of power and of liability, seems to be not the least among the needs of the American city to-day" (a).

Need for enhancing both powers and responsibilities.

69. Can a local corporation be punished for a crime? A principal under English law not being ordinarily punishable for the crimes of his agents, even when committed in the course of his employment and for his master's benefit, a corporation which must generally speaking act through agents only or not at all can be punished for a crime only on every rare occasions. This however is no reason why a corporation should not be indicted for a non-feasance or negative failure to perform a statutory duty. *Reg. v. Birmingham & Gloucester Railway Co.* (b). In *R. v. Great Northern Ry. Co.* (c) the process was carried a step further, and the argument that though indictment might lie for non-feasance it cannot for active wrongdoing was overruled. But obviously there are crimes for which it is impossible to punish a corporation in any circumstance. For instance, a prosecution of a newspaper company for an alleged infringement of the Lotteries Act of 1823 failed in *Hawke v. Hutton & Co. Ltd.* (d) because the court held that it was impossible to convict a corporation as "a rogue or a vagabond" within the meaning of the section

Criminal liability of local corporations.

For non-feasance.

For mis-feasance.

Limits of such liability.

(a) Munro, *Government of American Cities*, pp. 100-101.

(b) 3 Q. B. 223 (1842).

(c) 9 Q. B. 315 (1846).

(d) (1909) 2 K. B. 93.

under which the prosecution was instituted. But in *Pearks, Gunstone, & Tee Ltd. v. Ward* (a) and *Chuter v. Freeth & Pocock Ltd.* (b) it was held that a corporation could well be convicted for the offence of adulterating milk. But a corporation, not having a body to be punished, can neither be hanged or imprisoned. But as it can hold property, it can be fined. Hence it follows that a corporation can be indicted for such crimes only as are capable of punishment by fine alone (c). This too is the view which has been taken in the United States; *United States v. John Kelso Co.* (d). In *Empress v. The Municipal Corporation of the Town of Calcutta* (e), the corporation was indicted at the instance of Osmond Beeby and others under secs. 269, 270 (offences which are punishable with imprisonment as well as fine) of the Indian Penal Code. The corporation's plea that it could not be prosecuted without Government sanction failed before Ainslie & White, JJ., on the ground that the corporation of Calcutta was not a "public servant". History does not record whether the corporation of Calcutta was in the end acquitted, or convicted or, if the latter, whether it was fined only or had to serve out its term in the Presidency jail.

A Calcutta  
case,

Extraordi-  
nary judicial  
remedies.

70 Under English law, besides being suable in court upon a contract or for a tort and being subject to prosecution in the limited class of cases just considered, local corporations in England are subject to legal proceedings of a more or less extraordinary character in the High Court. For the use or abuse of their corporate power, for non-observance of conditions attached to the grant, and on the ground also that the Crown was deceived in granting the charter, a common law corporation could be made to forfeit its charter by the procedure of *scire facias*; whilst for the first-mentioned of these causes another procedure, viz., *quo warranto* was also available, the difference between the two methods being that in the former case, the charter was seized for good, whereas in the latter, the revocation might be only temporary and

(1) *Scire  
facias*.

(2) *Quo war-  
ranto*.

(a) (1902) 2 K. B. 1.

(b) (1911) 2 K. B. 832.

(c) Adler, Law of Corporations, p. 105.

(d) 86 Fed. Rep. 304 (1898).

(e) I. L. R. 3 Cal. 758 (1878).

might or might not be accompanied by the infliction of a fine. In a case of temporary revocation, the corporation was not dissolved but only suspended in its operation during the pleasure of the Crown. As at the present day local corporations are almost wholly statutory bodies, neither of these procedures appear to be available for terminating, whether permanently or for a spell, the career of a municipal or other local corporation in England. But proceeding by *quo warranto* may still be used with effect where the right of a body to act as a corporation is in question (a). But *quo warranto* proceedings will not be permitted for the purpose of attacking the legality of a charter of incorporation granted to a town through an officer appointed thereunder (b).

Not available  
against statutory  
corporations.

71. The high prerogative writ of *mandamus* may issue against any person, corporation, or inferior court, requiring him or them to do some particular thing therein specified which appertains to his or their office, is in the nature of a public duty, and is consonant to right and justice (c). Thus a *mandamus* may be granted to compel an election or the acceptance of a municipal office by one duly elected to it or of the person so elected by the corporation (d). A local corporation is scarcely in any of its relations a court of limited jurisdiction, and no writ of prohibition may issue against it for usurpation of jurisdiction. Also it may be doubted whether but for express statutory provisions permitting the removal of a proceeding before a local corporation by *certiorari*, it would ever have been suspected of performing any judicial act (e). But now, under sec. (4) of the Municipal Corporation Act of 1882, any order of the council of a municipal corporation for the payment of money out of the borough fund, and under sec. 80 of the Local Government Act of 1888, any order of a county council for the payment of money out of the county fund

(iii) *Mandamus*.

(iv) *Certiorari*.

(a) Adler, Law Corporations pp. 133-134.

(b) E. g., one calling upon the defendant to shew by what authority he claims to be a coroner or a mayor of a borough, on the ground that the borough charter has not been properly granted, *R v Taylor*, 11 Ad. & E. 919 (1840); *R. v. Jones*, 8 L. T. 503 (1863)

(c) Halsbury, Laws of England, Vol. X, p. 77.

(d) Adler, Law of Corporations, pp. 43-45.

(e) But see *Nundo Lal Bose v. The Corporation of Calcutta*, I. L. R. 11 Cal. 275 (1885) and English cases cited there.

Power of  
High Courts  
in India to  
issue prerogative writs.

may be removed into the King's Bench Division and may be wholly or partly disallowed or confirmed, with or without costs, according to the judgment and discretion of the court (a). The non-statutory powers of issuing prerogative writs appear to be possessed by the Chartered High Courts in British India, within the limits of their Original Jurisdiction at any rate, but sec. 45 of the Specific Relief Act (I of 1877) makes express provision for the issue by the High Courts of Calcutta Bombay and Madras of processes in the nature of *mandamus* requiring any act to be done or forbore, within the local limits of their Ordinary Civil Jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior court of judicature, in substantially the same circumstances in which a similar writ will issue in Great Britain.

Local corporations and their officials.

72. The relations of local corporations to their officers have been dealt with in a previous lecture (b).

Other local corporations besides municipalities and rural boards.

73. Municipalities and rural boards are not the only kinds of public corporations upon which Governments have relied for purposes of administration. There may be local corporations independent of municipalities and rural boards to look over special services. In tracing the history of local government in England, I had occasion to notice the fact that from 1834 onwards until towards the end of the 19th century, it had become customary for Parliament, with each new demand, to create a new set of local authorities operating in local areas differently constituted from any that had gone before. The resulting confusion and waste called loudly for a unification of local areas and authorities for all purposes, and though strenuous efforts have been made in that direction, the end has not yet been completely attained and to this day poor law administration remains in the hands of local boards who are virtually independent of the borough or the county authorities (c). New Zealand, we have already seen, rejoices in a profusion

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(a) Halsbury, *Laws of England*, Vol. X, pp. 173-174.

(b) Lecture XVIII *supra*, paras. 16-17.

(c) "In an Urban District the District Council and the Board of Guardians are elected separately and may consist of different persons. But it is otherwise in Rural Districts. Guardians, as such, are no longer elected for any rural Parish, but the persons who are elected members of the Rural District Council are also necessarily poor law guardians" Odger, *Local Government*, pp. 25-26.

of local boards for the performance of the many varieties of local government functions into which the socialistic proclivities of her population have led her. The natural tendency of such local authorities is to approximate the model furnished by the municipalities and rural boards in constitution, but being generally created to give effect to newly conceived policies of the Central Government, they are apt to be subjected to rather greater administrative control by the central authorities. No useful purpose will be served by a detailed examination of the constitution and capacity of each variety of such organisations as they exist in the several countries under examination, even were the materials for such an examination available.

74. Public corporations may however be constituted for performing other than local services. A railway company under State management if incorporated may be regarded as a public corporation. But the description would be hardly applicable to a privately owned railway company merely because the State, in order to prevent an abuse of the franchise to the detriment of public interest, may retain greater control over its organisation and working than over those of an ordinary trading corporation. The same distinction has clearly to be observed in dealing with universities. There may be independent as well as State-owned universities. The earliest European universities appear to have been independent of both the State and the Church, having had their origin in scholars' guilds for mutual protection (a), and the English and American universities to-day would certainly resent being treated as departments of the State. In the famous *Dartmouth College case* (*Trustees of Dartmouth College v. Woodward*) (b), the United States Supreme Court (adverting to the doctrine developed in the American courts that charters or statutes creating public corporations are not contracts and may therefore be changed and even extinguished by subsequent legislation) held that a college was a private eleemosynary and not a public corporation and its charter, in the absence of provisions reserving power in the legislature to amend it,

Other public corporations.

(1) State railway companies.

(2) State universities.

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(a) This is the view of Denifle as regards the University of Bologna. See Article on "Universities" in the *Encyclopædia Britannica*, 11th Edn.

(b) 4 Wheaton 518.



Tendency in the direction of setting up self-governing bodies subject to administrative supervision.

constitutes like the charter of any private corporation a contract protected by the Federal constitution from impeachment by State legislation. As all American statutes of incorporation now expressly reserve such power, the protection, such as it is, does not go far even in America, and of course it does not exist in any other country. A study of present day tendencies seem on the whole to suggest that though probably voluntary elective agencies will be increasingly brought into requisition for carrying on higher education all over the world, and it is likely that these agencies will be given a large measure of self-determination within spheres limited by law, the universities of the future are likely to be more and not less State-regulated than they have been in the centuries that have now passed away.

Use of the corporate idea to obtain damages against the State for officials' torts.

75. In systems (such as those of England and the United States) in which the State is constitutionally immune from action at the suit of aggrieved individuals, the hardships resulting from the rule have in some instances been sought to be alleviated by legislation expressly making certain Government officials or departments liable to action either in contract, or tort or for negligence, in the ordinary form according to the prescribed statutory conditions (a). The same object has been also attained by investing certain officials and departments with the attributes of a corporation for it has been held that in such cases they may be sued in their corporate capacity though not expressly made liable (b). From the point of view of the comparative jurist, this particular use of the corporate idea is devoid of significance, and there I must leave it for the present. For Indian instances of this device of incorporating Government departments, I may refer to the "Board of Trustees for the Improvement of Calcutta" and the similar body constituted for carrying on improvements in Bombay (c), and also to the Commissioners or Trustees of the Ports of Calcutta, Chittagong Bombay, Aden & Madras (d).

(a) Halsbury, Laws of England, Vol. VI, p. 414. The Lords Commissioners of the Admiralty, for instance, are in certain cases empowered to sue and be sued in the ordinary way.

(b) Halsbury, Laws of England, Vol. VI, p. 414, note (1).

(c) See Bengal Act V of 1911, sec. 3, and Bom. Act IV of 1898.

(d) Beng. Act III of 1890 sec. 4, Beng. Act IV of 1887, sec. 4, Bom. Act VI of 1879, sec. 4, Bom. Act V of 1888, sec. 4, Mad. Act II of 1905, sec. 6, and Bom. Act VI of 1886, sec. 4.

76. There are lastly what in America have been styled *quasi-public-corporations* such as the unincorporated counties, townships and school districts, which under statutory authority behave in most matters as single administrative units and differ from municipalities and rural boards in not having been formally incorporated. In the absence of express statutory authority they do not possess the capacity of suing and cannot be sued as a body corporate, nor, in the absence of such authority, can they borrow money or own property. This *quasi-corporate* character has been found in England to be sufficient in *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (a) to involve a private *quasi-corporation* like a Trade Union in litigation for a tort by its officials and make it answerable in damages therefor. But it is not likely either in America or in England that the rule will be extended to *quasi-public-corporations*, since being, like their officials, agents of the Government, they cannot be held responsible for the wrong of their officials as principals (b), even if the purely American doctrine that public corporations and *quasi-public-corporations* participate in the Government's immunity for their wrong be put out of consideration (c). The best Indian instances of *quasi-public-corporations* that I can think of are the Courts of Wards constituted by statutes for the several Provinces of India, which are persons enough to be able to take charge of the persons and properties of their wards and to act as their guardians, but not persons enough to sue or be sued as a body corporate. A Court of Wards has been judicially held in Bengal to be incapable of taking out grants of letters of administration on behalf of its wards, *Mussammat Ganjessar Koer v. Collector of Patna* (d), though in *Nrittya Gopal Biswas v. The Administrator General of Bengal* (e) it was pointed out that there was nothing in the law to prevent a court in a proper case from appointing a nominee of the Court of Wards as administrator.

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(a) (1901) A. C. 426.

(b) Halsbury, Laws of England, Vol. VI, p. 416 ; Vol. XXIII, p. 322 and the cases cited there.

(c) Goodnow, Comparative Administrative Law, Vol. II, p. 152.

(d) 2. C. W. N. 349 (1898).

(e) 10 C. W. N. 241 (1905).

## LECTURE XXI.

### CITIZENS' RIGHTS.

Citizens'  
rights  
defined.

1. Citizens' rights constitute the bed-rock of modern constitutional forms of government. The history of the progress of constitutionalism may from one point of view be regarded as the history of the growth of citizens' rights. Citizens' rights in modern constitutional forms of government do not by any means represent the same thing as citizens' rights in the ancient City States of Italy or Greece or in the cities and communes of Medieval Europe. Citizens' rights in those communities, broadly speaking, meant the right to participate in the government and the administration—in short, political franchise. Nor do such civil rights as one citizen may have against his fellow citizens as such by themselves constitute what is usually understood by citizens' rights in the language of modern constitutional law. Such civil rights enforceable in courts of law have existed in all communities at all stages of political evolution. Citizens' rights strictly speaking stand for that minimum of rights, privileges, protection and immunities which citizens may ordinarily claim from and against the Government as citizens, and without which membership in a political community to-day loses all moral value. In so far as the constitution of a country guarantees the participation by its citizens in the right to govern, the political franchise itself becomes part and parcel of the citizens' rights. In so far as that constitution assures to its citizens equal access to its executive and administrative machinery and equal protection of the law, that right itself will form part of the citizens' rights. Whether a right is a citizen's right or not depends thus upon whether or not it is really guaranteed by the constitution.

Relation of  
opposition,  
involved in  
the concep-  
tion of citi-  
zens' rights,  
between  
State and  
citizen.

2. The conception of citizens' rights, it may be as well to acknowledge from the outset, involves a certain opposition between the Government and the individual. The opposition, it may be urged, should not exist. No more should there exist any conflict of aims and purposes between citizen and citizen. It is a fact, however, that no social or political ideal worth pursuing can be enunciated upon which the Government of a country at any time and all its citizens will be found

to be in complete agreement. Most people again who are agreed as to the ideal in the abstract will fall out when they proceed to determine the method to be employed in attaining it. And this would be so, even when the search for ideals and methods to attain them is not prompted on the part of either the Government or the citizens concerned by what I prefer to describe as "mixed motives."

3. In saying all this, however, I do not wish to exaggerate the differences and conflicts which must mark the relations of Government and citizens and of the citizens *inter se* in any political community. The fact that in spite of all differences, people persist in living together in visibly united groups, representing, as they must, varying degrees of real solidarity, is itself proof positive that the points of agreement (not necessarily consciously thought out) must largely preponderate over the points of difference.

Fundamental  
unity under-  
lying differ-  
ences.

4. But the conflicts and differences exist in fact and cannot be abolished by the simple device (favoured by most idealistic philosophers) of ignoring them. If they did not, there would be no live political or administrative problems demanding serious consideration, administration itself would be reducible to a mere matter of machinery, and methods of politics would, not inconceivably, assume the precision of those of the physical sciences.

But the diffe-  
rences are  
real.

5. The opposition between the governing corporation and the individual citizens, never negligible even in true democracies, was more real and far-reaching when Governments were, more frankly than they are to-day, Governments in the interest of an individual, a family or a class. The first conscious assertions of citizens' rights everywhere were made, to resist real or supposed abuses of governmental power, by those amongst the governed who believed themselves to be oppressed—always the newly awakened politically conscious elements amongst the unenfranchised.

Character of  
the opposition  
in ancient and  
medieval poli-  
ties and the  
genesis of  
citizens'  
rights.

6. The admitted source of all citizens' rights to-day [ with one exception (a) ] is the Magna Carta which the feudal nobility of England extorted from King John in 1215. The motives which prompted the English barons to meet King John at

The English  
Magna Carta  
of 1215, the  
historic source  
of citizens'  
rights in  
modern public  
law.

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(a) That of Hungary, to which I shall presently refer.

Runnymede were nothing like those that inspired the protagonists of the constitutional revolutions of the 18th and 19th centuries. "The [natural and inalienable rights of man]" did not trouble them, nor did their claim represent demands of political privilege for which (like the Plebians of Rome) they may be supposed to have qualified themselves by their services to the body politic. Nothing calculated to demonstrate their political incompetence, they had really left undone in the previous century, and this they were to do even more completely in the centuries that were to follow. By the Magna Carta, the barons simply extorted from the King a pledge that he would respect his feudal obligations to themselves. The rights embodied in the Magna Carta were not citizens' rights in the modern sense. They were, and were plainly believed to be, not constitutional but legal rights which, under the feudal order, the barons undoubtedly had against their overlord, the King.

The real character of the baron's demand under it.

Feudal characters of Spain and Hungary.

7. The Magna Carta would have been impossible in any but the feudal age. Nor was it an isolated phenomenon in feudal Europe. Only six years after, in 1222, the Hungarian nobles got their counterpart of the Magna Carta, the foundation of their "liberties" (a), the celebrated "Golden Bull," from their King, Andrew II (b). In 1283, Peter III of Aragon, a strong King, was compelled to affix his signature to the "General Privilege" which in the words of Mr. Mackinnon (c), "placed the barrier of law between the subject and the arbitrary will of the King".

The baron's reservation of the right to compel fulfilment of the charter by force.

8. Truth to say however, neither the Magna Carta, nor the Golden Bull, nor the General Privilege, did really succeed in interposing the "*barrier of law*" between the subject and the King. In the absence of legal machinery to enforce that law—a thing which was still of the future—King after King, whenever one felt strong enough to do so, laid aside the charters as scraps of paper. The barons who took these written

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(a) "Liberties," in feudal parlance, meant privileges, exemptions, perquisites, monopolies and not general rights to be enjoyed in common. Some of these liberties were in fact dangerous obstacles to common welfare. See Pollard, *History of England*, pp. 53-54.

(b) Percy Alden, *Hungary of To-day*, p. 118.

(c) Mackinnon, *History of Modern Freedom*, Vol. I, p. 252.

pledges were fully conscious of the weakness of their "charters of liberties", and took care in each case to affirm their right to offer joint armed resistance to violations of the King's pledges. This claim to enforce the law by organised rebellion, however, found so little countenance with the population as a whole and with large sections even of the nobility that in none of the countries mentioned was it effectively enforced for any appreciable length of time. But the ideas embodied in the charters survived all breaches of the Royal faith and in fact grew and expanded with the spread of political consciousness amongst an increasing proportion of the population (a). I have stated elsewhere how the progress of the constitutional idea was suddenly arrested in Spain, and how the wealth of the New World destroying the dependence of the King upon the other orders made him absolute sovereign of the Spanish empire. The movement never lost its vitality in Hungary, but even if it ever did pass from politics into law (as to which I have my doubts, though the materials before me do not justify my pronouncing a definite opinion one way or the other), it had no opportunity to travel beyond the territorial limits of the kingdom. The English Magna Carta on the other hand, from being a catalogue of feudal privileges broadened by several centuries' accretions into a true Bill of Rights, so called from the historic document of 1688, the first constitutional compact known to history between a people and their Government. It needed something more than a peaceful revolution like that of 1688 to convert the legal rights embodied in the last-mentioned document into a declaration of the inalienable rights of men against Governments. Citizens' rights for the first time assumed their modern character of an aggressive claim to personal autonomy in 1776 in the Declaration of Independence of the thirteen English Colonies of America.

Progress from  
"Charters" to  
Bill of Rights  
in England.

First conscious claim of  
personal autonomy in the  
American  
"declaration  
of independence."

9. Citizens' rights in the United States of America are the same and yet not the same as they are in England. Had Coke and the other legalists of the one real revolution of England which temporarily established a republic prevailed against

Different con-  
ceptions of  
citizens' rights  
in England  
and America.

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(a) See Lecture I *supra*, para. 33. My thesis on this point as explained in that lecture appears to find confirmation in a paragraph in Mr. Roscoe Pound's article on "Law as Developed in Juristic Thought" in 30 Harvard Law Review, pp. 216 217.

Pym and the other more extreme Parliamentarians of the day, the resemblance would have been somewhat (but not on all points) closer (a). Coke never admitted that the Parliament could legislate away the sacred principles of the common law—that law which in his view had stood so long and so effectively between Royal caprice and the liberties of the people. The fundamental rights of English subjects guaranteed by the common law were to his mind sacred from interference as much by the King as by the representatives of the people assembled in Parliament, whose true function, if they only knew it, was to maintain and not subvert that law. The Parliamentarians, however, won the day, and the Parliament became in theory what it has never ceased to be since, more absolute than any King had ever been after the death of Henry I. English constitutional writers glory in what they euphemistically describe as the “omnipotence” of Parliament, oblivious of the fact that in order to control the absolutism of the executive, the English politicians of the 17th century set up another more blatant and fraught in more incalculable ways with menace to the liberties of minorities more numerous than those who brought about the revolutions of 1649 and 1688 (e). Thus it has come about that no law or custom of the constitution of England has a higher formal sanction than ordinary statute or common law, and even the most valued amongst rights recorded in the Bill of Rights must yield to any Act that Parliament may choose or be persuaded to pass, however contrary it may be to accepted and fundamental principles of good government. For protection against abuse by Parliament of its plenary legislative powers, the people aggrieved must resort (with what chance of success they must judge for themselves) to the polls, not to the courts. A statute in England, as Mr.

Citizens' rights in England guaranteed against interference by the executive, not by the legislature.

Parliament's omnipotence in England.

(a) Pym's early opinion (of which only there is record) repudiated the claim of omnipotence on the part of Parliament as strongly as Coke himself. But the Civil War by driving Parliament from one illegal act to another really left to its members no alternative other than a claim to such omnipotence in justification of their acts. McIlwain, *High Court of Parliament and its Supremacy*, pp. 83 *et. seq.*

(b) Neither of these revolutions represented a popular rising. The one against Charles I was really a civil war between different sections of the nobility and the upper middle classes, and that against James II was a rising of the majority of the same sections who were welded together more by King James's Romish proclivities than by his political pretensions.

Freund puts it compendiously, is thus superior to the constitution (a). People within the British empire therefore hold their most cherished constitutional rights at the pleasure of a body of men who meet at Westminster as much for pleasure as for serious business. It must be admitted however that, occasional lapses apart, these representatives of the British people in Parliament have on the whole discharged the trust and responsibility reposed on them with extraordinary good sense and moderation.

10. It was Parliamentary and not Royal absolutism that drove the thirteen American Colonies into revolt. When the Colonies had secured their independence, no assembly of peoples' representatives however well meaning, they argued, could be safely constituted the custodian of peoples' fundamental rights. Already these rights had come to be believed and spoken of by publicists in Europe and America as the inalienable and imprescriptible rights of men. The fathers of the new American constitutions were resolved that neither the Congress nor the Legislatures of the States of the Union should be omnipotent like the British Parliament. The Federal constitution, as it took shape in 1787, already provided against laws suspending the *habeas corpus* unless in case of rebellion or invasion, bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts. But even so, several of the Colonies refused to ratify it without more specific guarantees in favour of subjects' rights against legislative interference. The first ten amendments having supplied this deficiency to the satisfaction of the dissenting Colonies, the constitution as amended was ratified by all the thirteen States. Other amendments providing additional guarantees were embodied in the constitution in later years, one and perhaps the most important from the point of view of the present topic, so late as 1868. The principal specific restrictions upon legislation impairing citizens' rights are now those directed against legislation establishing a religion or forbidding its free exercise, abridging the freedom of speech, press and assembly, restraining the right to keep and bear arms, and authorising unreasonable searches and seizures. Retroactive legislation is restrained by the prohibition of *ex post facto*

Citizens' rights placed above interference by the legislature in America.

The American bill of rights.

(a) Freund, Police Power, p. 12.



laws and of laws impairing the obligations of contracts ; and the power of eminent domain is restrained by the requirement of compensation (a). But there are also general limitations provided in the 14th Amendment of 1868, to the end that all citizens shall enjoy the equal protection of the laws, which Freund regards as "perhaps the greatest safeguard of justice (b), and that "no person shall be deprived of life, liberty and property without due process of law." The former of these provisions read with the provisions of the 13th Amendment (abolishing slavery) and the 15th (bestowing active political franchise on the former slaves) have put it in the power of the courts in America to set aside all legislation based on unjust discriminations of class, colour, race, age, sex or interest.

11. The guarantee that no person shall be deprived of life, liberty or property without due process of law has been correctly traced to a well-known provision of the English Magna Carta. But whereas, as embodied in the Magna Carta and re-affirmed in later constitutional documents, it is a safe-guard against the arbitrary and despotic abuse of executive power, in the 14th Amendment of the American Federal constitution, it appears as a safeguard against unjust legislation. Due process of law," given this extended significance, has been interpreted to mean "conformity to the settled maxims of free Government." *Bertholf v. O'Reilly* (c). It has, in the words of Mr. Freund, thus become "a requirement of the constitution that every statute should be the exercise of some recognised power justified by the reason and purpose of government" (d) and by means which are reasonable, judged by the standard of "proportionateness of means to end" (e). To ascertain whether legislation is, with reference to the requirement of due process, constitutional or not, it thus becomes necessary for the courts to analyse the powers of government and define the nature of each. The requirement of due process of law thus implies

Limits of governmental power ultimately determined not by legislature but by the judiciary in America.

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(a) Freund, *Police Power*, p. 10.

(b) *Ibid.*, p. 14.

(c) 74 N. Y. 509 at p. 519.

(d) Freund, *Police Power*, p. 15.

(e) *Ibid.*, p. 58.

that each governmental power has its inherent law which stands above legislation, and the legislature and is enforced by the courts in the ordinary administration of justice (a).

12. It may be asked, why cannot a legislature of the peoples' own representatives be trusted to make no laws affecting people's rights which are not absolutely necessary in the public interest? The obvious answer is that no legislature however representative is infallible, and as legislatures must be governed by majorities they are seldom, on any question upon which popular passions run high, representative of the whole people, or even the best of them. Majority rule, in moments of excitement or anger, may easily turn into the rule not of reason but of prejudice, and may, in certain conceivable circumstances, make itself that worst form of oligarchy, the rule of the party which is physically or economically the strongest. If up till now the rule of the majority has in most places proved to be on the whole better and more equitable than the class rule which has gone before it, it is because so long democracy has been chiefly occupied in rectifying the grosser inequalities of preceding epochs. The American people have, to my mind, displayed rare political wisdom in not trusting their liberties, just saved from the pretensions of the omnipotent English Parliament, to the safe-keeping of the casual majorities of their own legislatures.

Why even representative legislatures cannot be suffered to be the ultimate custodians of people's rights.

13. It must be remembered however that the general limitations imposed upon legislation by the Fourteenth Amendment are not absolute. As interpreted by the courts, it leaves considerable scope to American legislatures for the free exercise of their "police" power, subject though it is to review by courts of law who are charged with the duty of seeing that this power is not abused or unreasonably exercised (b).

The scope of legislative activity not seriously restricted by the Fourteenth Amendment.

(a) *Ibid*, p. 15. It is perhaps necessary to add that the United States constitution does not guarantee freedom of speech and religion and right of trial by the jury against attack by the State legislatures. But this guarantee is provided by the State constitutions, most of which repeat the provisions of the National constitution, some being little more than a copy of the National bill of rights. Ashley, the American Federal State, pp. 460-464.

(b) "Under the American system of Government, the power and authority to make police regulations is vested: (a) In the Legislatures of the several States, to a plenary degree, subject only to the paramount authority of positive constitutional prohibitions. (b) In Congress to a

Constitution  
itself amend-  
able.

Constitution,  
the "supreme  
law" in Ame-  
rica, and the  
court its final  
interpreter &  
guardian.

Even the specific limitations mentioned above do not imply that the rights guaranteed by the constitution are absolutely inalienable and imprescriptible. The constitution itself may be modified, though with difficulty.

14. The constitution in America is the 'supreme law of the land' which must prevail over all other law whether of the legislatures or of the law courts. Courts in America, unlike those of Europe, have not only power to place authoritative interpretations on its language and declare all statutes contrary to it to be *ultra vires* of the legislature, they are expected and required to do so. It is thus the courts of law which in the United States finally set limits to the public law of that country.

15. It would be well before passing on to consider the nature and character of citizens' rights in other countries to

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limited extent and for special purposes. (c) In the authorities of Municipal Corporations in a subordinate and delegated manner. Black, Constitutional Law, 3rd Ed., para. 153. What is the extent of this power? Its scope is said to be properly limited to the making of laws which are necessary for the preservation of the State itself, and to secure the uninterrupted discharge of its legitimate functions, for the prevention and punishment of crime, for the preservation of the public peace and order, for the preservation and promotion of the public safety, the public morals, and the public health, and for the protection of all the citizens of the State in the enjoyment of their just rights against fraud and oppression. *Ibid*, para. 152. Its enlargement by continual loose application of the term to cases where it is neither needed nor appropriate is regarded as a serious menace to personal freedom. The following limitations to its exercise are noted: A police regulation to be valid must not (a) violate any provision of the Federal or State constitution, (b) interfere with the exclusive jurisdiction of the Congress, (c) unlawfully discriminate against individuals or classes, (d) be unreasonable, (e) invade private rights of liberty or property unnecessarily. (f) Lastly, it must actually relate to some one or more of the objects for the preservation of which this power may be exercised, and be proper and adapted to that purpose. Needless to say that under the American constitution it is the province and duty of the court to determine what are the proper subjects for the exercise of this power, and what constitutional limitations or restrictions must be applied to its exercise, and whether the statute in question is a reasonable exercise of the power; and as to the latter point the courts may and should enquire whether it has a real and substantial relation to public safety, health or welfare, and operates or tends in some real degree to promote and secure these objects. In other words, the legislative decision is not conclusive but is subject to judicial review and the courts are not precluded from such enquiry by the fact that the legislature has expressed its judgment or declared its intention in the statute. *Ibid*, para. 156. See paras. 14 and 15 *infra*.

adequately realise the stupendous responsibilities which the interpretation and application of the 14th Amendment impose upon the courts. The Fourteenth Amendment does not fix any definite standards, and the control of the judiciary over legislation implied in it is, in the last analysis, discretionary. It is thus that not the executive, nor the legislature, nor even the written words of the constitution, but the judiciary who become, in relation to the exercise of the police power of the State, the guardians of people's liberties. No doubt, the judiciary too are a department of Government and it is thus again a department of Government which conclusively determines whether a given act is within the principle of reason or not. "But the great advantage of the American system," Freund correctly points out, "is that the power of conclusive determination is withdrawn from a body accustomed to follow considerations of expediency and interest and vested in organs which by virtue of their constitution, methods of procedure, and traditions are peculiarly qualified and apt to give effect to the claims of reason and justice" (a). "Practically," the same writer adds, "the present system of judicial control over legislation has meant in many cases that unless all three departments of Government are convinced of the justice and reasonableness of a *radical* change in social and economic policy, it cannot become embodied in principles of law".

And guardian of people's liberties.

Advantage of the arrangement.

16. It would be impossible, within the limits of the present treatment, to define in detail the fundamental rights of citizens which courts in America have developed under the shadow of the Fourteenth Amendment. The subject is dealt with exhaustively and with unusual scientific accumen by Mr. Freund in the third part of his book on "Police Power". To mention briefly some of them, the courts have in the exercise of their Pretorian power vindicated against legislative interference liberty of body (*inter alia* against unreasonable contracts of servitude sanctioned in former times by a variety of labour legislation), liberty (within the limits of decency and safety) of private conduct (including freedom of social intercourse) and freedom (within reasonable limits) of association, migration, settlement and occupation. They have also protected citizens from unfair class discriminations in the

Fundamental rights of citizens protected by the Fourteenth Amendment.

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(a) Freund, *Police Power*, pp. 16-17.

enactment and enforcement of State laws. These coupled with the immunities specifically provided in the constitutions seem to set up *vis à vis* the Government not a mere aggregation of sentient organisms mechanically responding to the will and pleasure of an omnipotent Government, but human personalities living and autonomous, their autonomy in important ways limiting that of the Government.

Citizens' rights in Great Britain, its Self-governing colonies and dependencies.

17. I do not mean to affirm that this individual autonomy has ever been really wanting in the British constitution, I only mean to say that it is not guaranteed against interference by the ordinary mode of legislation. The trust reposed on their legislature by the British people has been so far justified that the liberties enjoyed by those directly governed by the British Parliament are scarcely less ample than those of an average American. It is otherwise however in the remote Colonies and Dependencies of the British empire which cannot be governed directly from Westminster and the internal government of which has not yet been handed over to self-governing representative legislatures. In these parts of the Empire, the laws are virtually made by the executive authorities and in circumstances which scarcely provide sufficient guarantees that the just rights of the people will receive adequate consideration. What liberties the people of these localities in fact enjoy they owe really to the spirit of the Home Government which colonial administrators carry with them to these distant lands, and which even long years of bureaucratic domination fail to stifle altogether. It must be noted, however, that the system under which young men fresh from the schools and colleges of the United Kingdom are sent out to the colonies as life-members of governing services is, in its results, not quite favourable to the maintenance of this spirit. To this at any rate are attributed certain notable departures in Indian legislation from the principles of English administrative law, to which I had occasion to refer in another connection in a previous lecture (a). Even judicial opinion seems, in some instances, to bear out the complaint one hears so frequently in this country that the executive in India are not averse to taking more power by statute than is justified by necessities. The

In India.

(a) Lecture XVIII, paras, 48-53 *supra*.

Indian Press Act (I of 1910) is an instance in point. The object of the Act was stated to be to control "a certain section of the press", which, in spite of successful prosecutions under the ordinary law against sedition, had, "continued, both by openly seditious writing and by suggestion and veiled incitement, to inculcate hostility to British rule," thereby leading young men peculiarly susceptible to these influences to commit murderous outrages of a distinctly amarchical character. But to Sir Lawrence Jenkins, C. J., the provisions of sec. 4 of the Act appeared to be "so very comprehensive and its language so wide" that it was "difficult to see to what lengths its operation might not be plausibly extended by an ingenious mind," "that they would certainly extend to writings that might even command approval," and "much that is regarded as standard literature might undoubtedly be caught" (a). Of the Defence of India Act (IV of 1915) under which power has been expressly taken, for the duration of the war (which the armistice of 11th November last has virtually but not *legally* brought to a close) and for six months after, to arrest and imprison without charge or trial, or to try by the aid of special tribunals persons suspected of or charged with crimes and misdemeanours quite unconnected with the war (b), Chapman, J., observed in the course of the argument in *Parmeshwar Ahir v The Crown* (c) that "no Act (i. e. of the Indian legislature) has gone quite so far as the Defence of India Act. It is the farthest limit to which the Government of India has gone," and in the course of the judg-

(a) *In Re: Mahomed Ali*, I. L. R. 10 Cal. 466 (1913).

(b) The Committee recently appointed "to investigate and report on the nature and extent of the criminal conspiracies connected with the revolutionary movement in India and to examine and consider the difficulties that have arisen in dealing with such conspiracies and to advise as to the legislation, if any, necessary to enable Government to deal effectively with them" have recommended incorporation, with modifications and subject to certain suggested safeguards, of these and like provisions of the Defence of India Act as parts of the permanent statute-book of India. The special tribunals appointed *ad hoc* for the trial of particular cases are however to be replaced by benches of three permanently appointed judges of the High Court. A bill embodying these changes is, at the time these pages are being seen through the press, receiving consideration from a select committee of the Governor General's Council where it met with a very hostile reception from the non-official members.

(c) (1918) Pat 97, at pp. 111 and 130.

ment indicated a possible contention not urged in the case that the Act might be invalid as involving "the abrogation of a function essential to the continued existence of the High Court." The statute book of India contains, besides, provisions restricting, for even normal times, the freedom of association and assemblage to an extent sufficiently marked to have called for special mention, under the title "special repressive laws," in Mr. J. B. Cotton's statement of the law relating to India in Halsbury's Laws of England (a).

18. But apart even from these special laws, which it may be assumed will be withdrawn the moment the provoking causes thereof should have been removed, the sum of citizens' rights possessed by the people of India seems meagre in comparison with that enjoyed by the British citizens of the United Kingdom. Indians have been promised equal access to all public offices since 1833. Quite recently, the Secretary of State for India made a statement in Parliament declaring it to be the aim of the Home Government to give India a measure of responsible government adequate to the requirements of the country. Until these and other pledges should have been translated into action, India will not have much to show in the nature of citizens' rights. Equality before law has been in a large measure secured by the establishment in a modified form of the English "rule of law." But even here, the Civil and Criminal Procedure Codes contain provisions giving special procedural privileges to European British subjects and to high officials at criminal trials, and to highborn people and men of rank and position at civil trials (b). Security of property Indians enjoy in the same degree as Englishmen, except for the fact that they must pay whatever taxes are imposed on them by a non-representative legislature. But it should be noted that taxation does not on that account generally err in the direction of severity. Privacy of correspondence is no more secure in India than it is in England, and having regard to the large powers of search given by the law to magistrates, police and other officers, the domicile of an Indian does not appear to be quite as inviolable as the domicile of an English-

(a) Halsbury, Laws of England, Vol. X, pp. 620-621.

(b) Criminal Procedure Code (Act V of 1898), Ch. XXXIII and sec 182 and 197; and Civil Procedure Code (Act V of 1908), sec. 133.

man. There are no legal restrictions to freedom of migration and settlement and to the pursuit by an Indian of any trade or calling of his choice, but the *laissez faire* policy until now followed by Government even in the face of keen State-encouraged and State-subsidised foreign competition has narrowly restricted their freedom of choice. (a). Since education both primary and secondary has to be paid for and is not compulsory, the Indian child has no right of education; and, in the absence of a poor law of any sort, no Indian has a right to aid when left without means of support. The Indian enjoys full freedom of worship; and, as I have stated elsewhere, Indians possess, to them, the inestimable privilege of suing the Government in courts of law upon contracts as well as on torts, though even here doubts have been thrown on the extent of this right in certain Indian decisions which have been discussed in a previous lecture (b). This, the one real right which has been guaranteed to them against the Indian legislature by Parliamentary statute, was narrowly saved from being taken away by legislation recommended to Parliament by the Government of India in 1916, a measure which, fortunately, failed to pass the Joint Committee of the two Houses of Parliament which sat to consider it. Putting aside the provisions of the Defence of India Act IV of 1915,

Guarantees due to restricted powers of Indian legislatures. Sec. 32 of the Government of India Act of 1915.

(a) Freedom of settlement and trade is, I understand, seriously restricted in certain backward areas, such as the Santal Pergannahs and the Kolhan in Chotanagpur. The statement in the text has therefore no claim to universal application in all parts of British India. As to industrial opportunities, the Montague-Chelmsford Report on Indian Constitutional Reforms takes special note of the poverty of the people of India and the duty which rests on the Government to develop the industrial resources of the country whereby only the general level of well-being in the country may be materially raised. Amongst the political evils which arise out of India's industrial helplessness and dependence for manufactured goods on foreign countries are noted the lack of outlet for educated Indian youth and the consequent discontent amongst the educated classes and the general suspicion, to which the fact that Indian foreign trade is largely with the United Kingdom lends colour, that this industrial backwardness has been positively encouraged in the interest of British manufacturers. "In the days of the Company," the Report states, "the commercial development of the country was naturally fostered as a matter of business. But the later attitude of Government towards the promotion of industries has been greatly affected by *laissez faire* doctrines and fear of State competition with private enterprise." See the Report, paras. 331-334.

(b) Lecture XIII *supra*, paras. 22-28.



Sec. 65 of the  
Government  
of India Act  
of 1915.

which by its terms is to last only for the duration of the present war (a) and for six months thereafter (b) and the State Prisoners Regulations and Acts, the Indian citizen possesses freedom from arrest in the same degree almost as a British citizen in England, notwithstanding the fact that the writ of *habeas corpus* does not according to judicial decisions run through the greater part of India. Trial by jury is not, and indeed no particular mode of trial is, guaranteed to Indians as it is for certain classes of trials in America and some countries of Continental Europe; nor is there any guarantee against trials by special tribunals such as exists in the constitutions of Switzerland and some other Continental countries and a number of Latin American Republics; but the provisions of Act XI of 1857 and the Defence of India Act IV of 1915 apart, trials by special tribunals of private citizens have but rarely occurred in India. In sec. 42 of the Government of India Act of 1833, Parliament enacted a provision which, as embodied in sec. 65 of the Government of India Act of 1915, withholds from the legislatures in India power to make "any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom". What this clause exactly means has been a subject of controversy in India. But Mr. Justice Norman was of opinion in *Ameer Khan's* case (c), that as allegiance to the Sovereign is correlated to and is dependent on the protection which is due from the Sovereign to the subject under the common law, the common law guarantee of fundamental rights of British subjects were protected by this clause from abroga-

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(a) The war has in law been only suspended and not concluded by the armistice of 11th November 1918.

(b) As previously observed, the Rowlatt Committee has recommended the incorporation, with modifications and subject to certain suggested safeguards, of the provisions of this Act in the statute book of India until at least the revolutionary conspiracies which they are intended to check should be completely overcome, and a Bill embodying these recommendations, which was received with unqualified disapproval by the non-official (Indian) members of the Council of the Governor General has, as these pages are going to the press, been referred to a Select Committee of the Council.

(c) 6 Bengal Law Rep 392 at p. 451 (1870).

tion by the Indian legislature in the case at any rate of persons in India who before 1833 enjoyed the protection of that law. Norman, J., further seemed to think that as the common law did not apply to Indians residing in the Mofussil, the provision of the statute did not apply to them. I have elsewhere given reasons in support of the suggestion that the common law should be held applicable to British subjects without distinction in every part of India. Assuming that this is so, and that the interpretation placed on the provision by Norman, J., is correct (a), I cannot help thinking that in this provision is embodied a guarantee comparable to a certain extent to the provision of the Fourteenth Amendment to the Federal Constitution of the United States, and lawyers and judges in India have missed a great opportunity in failing to make it as fruitful of constitutional principles as the Fourteenth Amendment has come to be in the hands of American judges and lawyers.

19. I have already stated that no citizens' rights however fundamental are immune in the British Empire from interference by Parliament. The great constitutional documents provide immunities from interference by the executive not authorised by statute. These, which stand for fundamental citizens' rights under the English constitution, include (1) the right to personal freedom secured by the prerogative writ of *habeas corpus*, (2) non-interference with property, (3) non-taxation without legislation, (4) right of petitioning, (5) equality of officials and non-officials before the law, (6) protection from arbitrary search and seizure, (7) freedom of discussion within the limits of law, (8) freedom of assembly under similar conditions, (9) freedom of association for lawful purposes. It should be remarked in passing that not all these rights are specially guaranteed by Parliamentary statutes, but some follow naturally from the absence of specified restrictions of law upon the freedom of individuals to act in what manner they please so long as they do not commit breaches of the law. It would generally indeed

Citizens' rights under the British constitution.

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(a) Norman, J's., view appears to have been disapproved on appeal by Phear and Markby, JJ., 6 Beng. L. R. 392 (1870) at pp. 477 and 481, but it is approved by Rahim, C. J., in *Mrs. Annie Besant v. Emperor*, I. L. R. 39 Mad. 1085 (1916), at pp. 1113-1115.

be more correct to say that under the English constitution, an individual is ordinarily free to commit even breaches of the law but at the risk of paying the penalty provided by it.

Citizens' rights in France.

20. The autonomy of the human person *vis à vis* the State was affirmed with unmistakable emphasis in the Declaration of the Rights of Man and of the Citizen by the leaders of the French Revolution in the year 1789. "The end of all political association", the declaration proceeded, "is the conservation of the natural and indefeasible rights of man." In the first article of the Declaration of Rights of 1793 occurs a passage which lays down that "the end of society is the common welfare. The Government is founded for the purpose of guaranteeing man the enjoyment of his natural and indefeasible rights". These declarations of rights therefore made the autonomy of the individual anterior and superior to the State which according to them exists for no other reason than to protect and secure this autonomy. The Government of the Committee of Public Safety which kept the soil of France free from foreign invaders and even carried war into the enemy's country was a travesty of this autonomy. Even as a philosophical doctrine it met a violent death with the accession of Napoleon's empire. A century's experimentation in constitution making has at length cured French constitutionalists of the habit of including long bills of rights in their constitutions; and the constitution now in force has got no bill of rights in any part of it. Philosophical writers seem still disposed to regard the Declarations of Rights as embodiments of living constitutional principles. But as in England, as a proposition of practical politics, the legislature and the executive between them are free to work out what citizens' rights they may deem advisable to recognise at any moment. Nevertheless, it is only fair to note that to the principle of equality (which with liberty and fraternity formed the triple watchword of the Declarations of Rights), French publicists trace the following institutions: (1) universal suffrage, (2) equal obligation of military service, (3) rules regarding promotions in the army, (4) apportionment of taxes according to ability to pay, (5) the establishment of governmental schools and the principle of competition in them and in the admission to the public services, (6) the equal right of inheri-

No bill of rights in the constitution.

Rights worked out by legislature as in England.

tance of children and the abolition of entails, (7) the abolition of privileges in the matter of carrying arms, hunting and fishing and of jurisdictional privileges (a).

21. The experience of America might lead one to suppose that wherever a constitution embodies a bill of rights the necessary consequence thereof is to place these rights above interference not merely by the executive but also by the legislature. But as I have pointed out more than once, it is not usual on the Continent of Europe and even in America outside the United States to admit the competence of the courts to pronounce upon the constitutionality of statutes, the legislature alone being moreover generally considered to be the sole authoritative interpreter of its own Acts. The power of courts to declare legislation invalid on the ground of its being unconstitutional is expressly denied in the Austrian and Swiss constitutions, as also in the Mexican which in other respects is so largely influenced by the constitution of the United States. The constitutions of Belgium, Sweden and Chile roundly declare that the authoritative interpretation of laws is vested exclusively in the legislative power. The highest court of Germany has claimed it to be within its competence to pronounce Imperial statutes invalid as being unconstitutional, but the power has in fact been never yet exercised (b). It must therefore on the whole be concluded that such citizens' rights as are declared inviolable in the constitutions are not guaranteed against interference by statute outside the United States.

22. In some instances, moreover, the failure of the legislature to provide suitable remedies for enforcing the guaranteed rights has in effect made them unavailable even against the executive. This has been notably the case in Prussia and Austria; so much so, that in advertence to the absence of machinery for giving effect to the elaborate bill of rights contained in the Prussian constitution, Dr. Gneist has spoken of it as *lex imperfecta* (c)! Thus what in America is viewed as the supreme law is dismissed in Prussia as a law of imperfect obligation, so much depends upon the point of

Practice of including bills of right in constitutions in Europe and Latin America does not place citizens' rights above interference by the legislature.

Chiefly because court's authority to finally interpret statutes and to pronounce on their constitutionality is denied.

Absence of legal machinery prevent citizens' rights being effectively guaranteed against executive interference in Prussia.

(a) Freund, *Police Power*, p. 628,

(b) Lowell, *Governments and Parties in Continental Europe*, Vol. I, 284.

(c) Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 286-287.

view. Thus while the constitution solemnly guarantees the liberty of instruction, no statute having been passed to carry them out, the previous laws remain in force whereby no school can be opened without permission from the Government. Again whilst the constitution declares that the right to assemble without arms except in the open air shall be free, in point of fact notice of every meeting held to discuss public affairs must be given to the police who have a right to be present and a very extensive power of breaking it up. "The result of this," says Mr. Lowell, "is that neither the legislature nor the citizens have sufficient means of defending their rights and although the recent increase of local self-government and the establishment of administrative justice have done something towards remedying the defect, personal and political liberty are still far from enjoying the same protection as in Anglo-Saxon countries."

And in  
Austria.

23. Of Austria, the same writer says (a), "Although the fundamental laws purport to guarantee certain personal rights and one of them is framed for that special object, yet in fact the guarantee is by no means strongly effective. Not only do these laws fail to impose a legal restraint on legislation or render void a statute that infringes their provisions, but some of their clauses are mere statements of general principles that still await legislation to carry them into effect, while others are limited and qualified, if not actually contracted, by statutes which rob them of most of their value. The fundamental rights speak of a right to sue officials for injuries done in the exercise of their office, but no law making this possible by providing a method of procedure has yet been passed. Again, the right of meeting and forming associations is recognised in principle, but except for trading societies and religious bodies belonging to particular sects, an association cannot be formed without an official certificate which may be refused in case its object is illegal or dangerous to the State. Copies moreover of the by-laws of societies, of their reports to the members of their business transacted, of the officers elected and in the case of a political society even of the names of new members, must be given to the Government, and in order to prevent all possible controversy all correspondence between political

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(a) Lowell, *Governments and Parties in Continental Europe*, Vol. II, pp. 79-81.

societies in specially forbidden. The police have also a right to be present at the meetings of associations with power to dissolve them, even to break up the society itself if anything is done which does not fall within its objects as stated in its byelaws. As for public meetings held for any purpose by persons who do not belong to a regular association, the officials can virtually forbid them or disperse them at pleasure.

24. "Again although the fundamental laws guarantee the right to express one's opinion and declare that there shall be no censorship of the press, yet the statutes provide that the business of printing shall not be carried on without a license and every number of a periodical must be submitted to the police before publication so that it may be confiscated if it contains anything contrary to law. Moreover, periodicals issued fortnightly or oftener cannot be started until a deposit has been made with the Government to secure the payment of fines and they can be suppressed if this is not kept good, a provision that hinders the publication of small newspapers and gives the Government a hold over the daily press. Finally, the constitutional rights can be temporarily suspended altogether by a proclamation of the state of seige issued by the Ministry" (a). Lastly, the Reichsgericht which has been specially entrusted with the duty of protecting the rights guaranteed by the fundamental laws from infringement by the officers of the Government, and is for that purpose independently constituted, is forbidden to question the validity of a statute which has been promulgated in proper form.

25. The courts of Belgium have no more power than those of Prussia and Germany to examine the constitutionality of statutes. Nevertheless the bill of rights embodied in the Belgian constitution is as real as the liberties secured to Englishmen by the law of their constitution. M. Charles Faider, a very eminent Belgian lawyer, speaking before the Belgian Court of Cassation over forty years ago, said : 'Freedom reigns among us without flaw and without infringement. It takes every form, it sustains every right. I have freedom of person ; and I can only be arrested in the prescribed manner. I have freedom of home ; and my dwelling is inviolable, subject to the

Citizens'  
rights in  
Belgium.

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(a) Lowell, *Governments and Parties in Continental Europe* Vol. II, pp. 82-83.

rule of law. I have freedom of property, and I am guaranteed against expropriation, confiscation and arbitrary taxes as well as forfeiture which has been abolished. I have freedom of activity; I am free to work, to choose my trade, to enter into industrial contracts. I have freedom of opinion, for all the channels of the press and of publication are open to me. I have freedom of speech, for I can speak freely whether in Parliament, in the pulpit, in the police court, at the bar and in whatever language. I have freedom of thought for no one may violate the privacy of my letters and the law lays no hand on my thoughts, even my guilty thoughts. I have freedom of worship, for my conscience is free, the ministers of my religion are independent; I may let it exert its full influence and efficacy for me. I have freedom of instruction, for I am allowed to teach and to learn, where I like and at every stage what is known and what is believed. I have freedom of movement, for every barrier has disappeared within the country and the protection of foreigners is assured. I am free to seek help, to claim justice, to make my voice heard against any oppression, for I can use when I please the right of petition". "These words," says Mr. Ensor, "are as true to-day" as when they were spoken (a).

Citizens' rights in Switzerland.

26. In Switzerland, as in Belgium, the Courts have no competence to question the constitutionality of statutes. Therefore the bill of rights in the Swiss constitution is not above interference by the legislature. Nevertheless, next to Belgium and England, individual liberty is most efficiently guaranteed in actual administration in Switzerland. Equality before the law, freedom of movement, liberty of religious belief, freedom of opinion and of association, right to petition Government, right to appear before the legally constituted tribunals erected for special purposes, prohibition of imprisonment on account of debt and of all corporal punishments, prohibition of execution for political offence and freedom of occupation are very real rights in Switzerland (b).

Citizens' rights in Italy.

27. The bill of rights in the Statuto of Italy guarantees to all inhabitants of the kingdom equality before the law, liberty of person, inviolability of domicile and of property,

(a) R. C. K. Ensor, Belgium, pp. 163-164. (Home University Library.)

(b) Vincent, Government in Switzerland, Ch. XXI.

freedom of the press, exemption from non-Parliamentary taxation, and, with qualifications, freedom of assembly (a). Except for the provision forbidding censorship of the press and "perhaps" that protecting the right of public meeting, this bill of rights, according to Mr. Lowell, was not designed to guard against oppression by the legislature, but (as in England and Belgium) only by the executive.

28. In Spain, as in Italy, the distinction between constituent and legislative powers is not sharply drawn and a simple Act of the legislative body is in practice adequate to modify the working constitution of the kingdom. The bill of rights embodied in the present constitution guarantees freedom of speech, freedom of the press, peaceful assemblage, the formation of associations, petition, unrestrained choice of profession and eligibility to public offices and employment "according to merit and capacity." Immunities guaranteed include exemption from arrest "except in cases and in the manner prescribed by law," exemption from imprisonment except upon the order of a competent judicial officer, freedom from molestation on account of religious opinion "provided due respect to Christian morality be shown" and exemption from search of papers and effects and from confiscation of property save by authority legally competent. Penalties other than those fixed by law may not be imposed by civil or military authorities. Immunities respecting arrest, imprisonment, search, freedom of domicile, freedom of speech and press, assemblage and association may under the provisions of the constitution be suspended throughout the kingdom or any part of it, but only when demanded by the security of the State and then only temporarily and by means of a specific law. In no case may any of the other guarantees be withdrawn even temporarily. When the Cortes is not sitting, the Government is authorised to take all emergent measures, subject to early ratification by the Cortes (b).

Citizens' rights in Spain.

29. "It need hardly be pointed out," says Mr. Ogg, "that the opportunity for the evasion of constitutionalism which is created by the power of suspension is enormous and any one at all familiar with the history of public affairs in Spain would be

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(a) Ogg, *Governments of Europe*, pp. 366-367.

(b) Ogg, *Governments of Europe*, pp. 611-612.



able to cite numerous occasions upon which, upon pretexts more or less plausible, the guarantees of the fundamental law have been set at naught."

Citizens' rights in Denmark.

30. Bills of rights figure in the constitutions of the three Scandinavian kingdoms. That of Denmark contains a wide variety of guarantees respecting religion, freedom of the press and speech, liberty of assemblage and of petition and uniformity of judicial procedure, which taken together constitute a very substantial bill of rights (a).

In Holland and Japan.

31. The bills of rights in the Dutch and Japanese constitutions as also in the now defunct constitution of Russia are expressly made subject to legislation and are therefore obviously intended to protect the citizens from the executive and not the legislature. This appears indeed to be the general character of the charters of liberties of all countries other than the United States.

Bill of rights in the Portuguese Republic constitution.

32. The bill of rights in the Portuguese Republican constitution of 1911 possesses a peculiar interest as being the latest and the most comprehensive embodied in any constitution. To citizens and alien residents it assures full liberty of conscience, freedom of speech and of the press, liberty of association, inviolability of domicile and property, privilege of the writ of *habeas corpus* and freedom of employment and trade, *save only when restriction is required for the public good*. Law is declared to be uniform for all and no public privilege may be enjoyed by reason of birth or title. None may be required to pay a tax not levied by the legislative chamber or by an administrative authority specially qualified by law; and, save in cases of enumerated offences of serious import, no one may be imprisoned except upon accusation according to forms of law. *No one may be compelled to perform an act or to refrain from the performance of an act except by warrant of law* (b).

Evaluation of bills of rights in modern constitutions.

33. A survey of the bills of rights, such as I have just concluded, suggests certain observations of a general character which I think should be recorded in this place. It is to be remarked, first, that they are all institutions of recent growth which had no parallels in Greek, Roman or other ancient polities. Secondly, they all represent attempts to give practical

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(a) Ogg, Governments of Europe, p. 559.

(b) *Ibid*, p. 643.

shape to certain conceptions of the relations of the governing corporation and the individuals under its governance. Thirdly, these conceptions are on the whole eminently practical and have very little of the Utopian about them. They cannot be dismissed as mere cogitations of philosophers which have no practical bearing upon the facts of life. But that does not mean that they are not inspired by that deepest and truest of philosophies—the philosophy of experience. They are the crown and the consummation of the science of politics descending into practical life.

34. Again, though most of them came to be formulated within the space of less than a century, they have by no means been blind copies of some captivating original. They are organic growths which exhibit important differences in content as well as method. These differences, it is not my purpose either to overlook or under-estimate. It is indeed these differences that to my mind add to the value of the numerous points in which they all agree. They all agree in prescribing for the individual a sphere of liberty and autonomy upon which the Government itself may not, in the absence of compelling reasons, enter or encroach. This agreed sphere of individual liberty embraces at the very least freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression and freedom of conscience. Without these, life in these days would truly be (in language which I borrow from Hobbes) "poor, nasty, brutish, short." But out of all the bills of rights just reviewed one in particular, that of the United States, stands out for special mention and the only one in which this sphere of individual liberty is derived from the same source which sustains the legislative and the executive organs of the State, viz. the constitution, and is thus co-ordinate with them. This is claimed by American publicists as the point where "the great advance of the American idea over the European in the development of constitutional law is most deliberately manifested" (a)—a claim which, for reasons which I shall presently state, must compel assent even from non-Americans. But before I proceed to do that, certain other basic elements underlying the modern conception of a bill of rights demand notice.

Bill of rights  
in the American  
constitution why  
superior to  
bills of rights  
in other  
constitutions

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(a) Burgess, *Political Science and Constitutional Law*, Vol. I, pp. 178-183.

Underlying idea of the bills of rights—reconcilability of State and individual interests.

The most important of these elements is that in defining a sphere of autonomy for the individual, these bills of rights do not set the individual in irreconcilable opposition to the State. Individual interests must according to each one of them yield before genuine public interests. The autonomy of the individual must not be suffered to be used to serve anti-social ends. I have underlined certain passages of the abstract of the Republican constitution of 1911 of Portugal given at page 578 to show this, but the idea, it must be clear to every one, underlies every one of the constitutions which I have reviewed in this lecture. These constitutions (not excluding even the Prussian), without doubt, convey in terms which cannot be mistaken the unanimous repudiation by the world of practical politics of that blatant claim of State omnipotence which has figured in the writings of philosophers from Bodin downwards, in those, amongst others, of Hobbes, Rousseau, Hegel, Austin, Jhering and Jellinek. Equally unmistakable, however, is their repudiation of that anarchical individualism which regards every form of State regulation as a violation of the sacred principles of personal autonomy. Neither do they represent a mechanical compromise of an essentially temporary character between opposing forces. Whilst they recognise the opposition as a fact, they refuse to view it as irreconcilable. An efficient organ for reconciling the opposition between the State and the individual, between public and private interests, has I admit been nowhere yet perfected. More than one may possibly be evolved to answer the requirements of different orders of States. The experiment has really only just begun. But so far as it is possible to judge upon the present results of these imperfect experimentations in the building of political institutions, the American administrative machinery appears to me to have distinctly taken the lead in that direction. The American point of view has nowhere been given happier expression than by Mr. Freund in the following passage :

The question really is—where to find the conciliator.

The American view of the relation of State to individual.

36. "Public policy assumes the superiority of social over individual interests. The highest conception of the State however repudiates the absolute and unquestioning subordination of the individual to society and insists upon the preservation of individual liberty as an essential factor in

civilisation and as one which will ultimately lead to a more perfect social welfare, though it may produce temporary disturbances or delays in the accomplishment of what is believed to be the public good. This conception of the State is endorsed by our constitutions and the idea of a public welfare bought at the cost of suppressing individual liberty and right is therefore in our system of government inadmissible."

37. "It may be true", the writer goes on to observe, "that ultimately there can be no conflict between the highest individual and the highest social interests, and the harmony of all interests is an ideal which every legislative measure professes to contemplate and further. But until the conditions of that harmony are discovered, it must happen that genuine individual interests are made to yield not only to genuine social interests but also to interests which while being put forward as social are not such in reality. The question then arises whether a measure of that character is justified as an exercise of a power which is conceded only as a means of promoting the public welfare".

38. The conflict between the claims of public welfare on the one hand and of individual autonomy on the other being, in the present condition of social and individual morality, thus admitted to be real, the question arises, who should be selected to act as the supreme arbiter between these claims. A representative legislature is the choice of Great Britain, Belgium, Switzerland and apparently also of Holland, Denmark, Norway, Italy, France, Spain, Portugal and the Latin American Republics. The Governments of Germany, Austria and Japan, however, have not been able even now to hand over this trust entirely to their legislatures, so that in those countries the executive government still remains, in a large measure, the final judge of the degree of autonomy that it must concede to individual citizens. In India and the Crown colonies of the British Empire in general, no representative legislatures having yet been constituted, the autonomy of the individual rests, from the legal point of view, entirely upon the will and pleasure of the executive government, tempered though this no doubt is, in material respects, and made tolerable by the principles and practices

The supreme arbiter between the claims of Government and individual.

(i) A representative legislature in some countries.

(ii) The executive participating in others.

(iii) The judiciary in the United States.

Appreciation of the American doctrine of police power.

of English administrative law. But it was reserved only to the United States so to arrange matters as to remove all controversies between the State and the individual at once from the interested arbitration of the executive and the partisan disposal of the legislature, and entrust their determination to the authority which has been found in practice to be the most satisfactory for determining disputes between individuals and individuals. And how, it may be asked, has the judiciary in America responded to this call? No court, I venture to think, need be ashamed of its records, which in trying to hold the scales even between public interests and private rights has been able to lay down principles of sound administration such as are found enshrined in the American Law Reports. No law, it need scarcely be stated, can in any view of justice be assumed to infringe upon personal autonomy which penalises what is intrinsically vicious, evil and condemned by social sentiment. The law, on the other hand, which would compel the doing of that which is intrinsically vicious, evil and condemned by social sentiment would justifiably provoke resentment and resistance. Between these extremes of opposing certainties, however, lies a region of uncertainty and debate which can be satisfactorily charted by the aid only of the highest conceptions of justice and public policy. No view of justice and public policy demands that the individual should be restrained only from doing what is positively wrong, and that all regulation of individual activity beyond the prevention and penalising of actual wrong done should be necessarily condemned as a violation of individual liberty. People who choose to live in society must not only refrain from doing what is positively wrong, but must also be prepared to sacrifice amenities in the interest of social welfare. Social relations are intrinsically relations of "give and take" in which again, rightly viewed, the giving may be found to preponderate over the taking. The American courts, being charged with the duty of defining the legitimate limits of State interference with such amenities, have developed the doctrine of "police power" which through all its Protean manifestations appears to endeavour, not indeed to punish evil actually done—the State's competence in regard to that, has never been in question—but to prevent evil by regulations intended to check the tendency towards it. This it seeks to do

without infringing upon the autonomy of the individual, by placing a margin of safety between that which is premitted and that which is sure to lead to injury or loss (a). This margin of safety has to be determined by the highest application of the rule of reason, for upon its correct determination depends the advancement of the highest social well-being, that which includes and implies the well-being of each autonomous individual embraced within it. The recognition of individual autonomy—of citizens' rights which even the State cannot infringe or take away—does not, in this view, militate against those same citizens having to submit their lives and affairs to being ordered and regulated by the State within limits determined by reason, due regard being paid by it to the constantly changing needs of social well-being, the least variable element in which is the maintenance in its highest efficacy of the sacred personality of the individual (b).

(a) Freund, *Police Power*, p. 25.

(b) That the common law conception of the relation between the State and the citizen as developed in the United States is not one of irreconcilable opposition is best demonstrated by the right which that law has recognised in the Government of that country to command the services of its citizens in case of necessity, and that without any obligation on the part of the Government to compensate the citizen those services the State has "conscribed". The service may be enforced by *mandamus*, and failure to accept office constitutes an indictable offence. See Lecture XVIII, *supra*, para. 23. In *Butler v. Perry*, 240 U. S. 328, a Florida statute requiring labour for two days in each year upon the public roads was held to be constitutional. In *Dennis v. Simon*, 51 Ohio St. 233, 36 N. E. 832, conscription to build public roads was held not to be such involuntary servitude as the State bill of rights prohibited. Conscription to serve the State's needs has in fact been upheld as being neither slavery nor involuntary servitude within the meaning of the Thirteenth Amendment or similar guarantees in the States' constitutions. The constitutions of some of the States, however, provide that no man's particular service shall be demanded without just compensation (e. g. those of Indiana and Tennessee). Freund, *Police Power*, paras. 613, 614. Unpaid compulsory service as obtaining in England and Germany has been discussed in Lecture XVIII *supra*, paras. 23-24. In Switzerland acceptance of certain services, usually local, is obligatory. "Compulsory service", says the Local Government Act of Zurich, "is maintained principally for the benefit of the smaller communities, which, without this means, would find it impossible to fill their offices acceptably". Vincent, *Government of Switzerland*, Ch. VIII.

Conscripted  
services and  
citizens'  
rights.



# BOOK III,

## ADJECTIVE ADMINISTRATIVE LAW.



### LECTURE XXII.

#### ADMINISTRATIVE ACTION AND CITIZENS' RIGHTS.

1. Stress was laid in the previous lecture on the conflict of aims and interests between the administration and the citizens. The conflict undeniably exists as a fact in every system of administration. The conflict however, as I took pains to show, does not mean a death struggle which can be solved only by one of the opposing forces destroying the other. I have elsewhere pointed out that administration is a function of two factors, the State and the individual, and to destroy either is to destroy the administration itself (a). In the last lecture I have demonstrated that public interests are not advanced by destroying human autonomy, and that the maintenance to the highest point of efficacy of human personality should be regarded as one of the permanent ends of social well-being. Still less, is it to the interest of the individual to set himself in permanent opposition to the administration. Administration ultimately is as much an affair of the people as of the Government, and the best administration is that which succeeds most effectively in securing the willing compliance by the people with its demands.

Administration as much an affair of the people as of Government.

2. Notwithstanding the ultimate identity of interests, however, the administration and the citizens must often find themselves at cross purposes. The reasons for this will be found in the very nature of things. *First*, it is impossible at the present moment to imagine conditions in which the administration will not only be invariably actuated by the purest motives but will also in all its acts be guided by an unerring judgment. It is, *secondly*, impossible to imagine a state of society in which all the citizens at all times and

Why Government and people find themselves at cross purposes.

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(a) See Lecture V *supra*, para. 8.



in all circumstances will not only be incapable of wishing to do wrong, but will not do it even by mistake.

Business of administrative law—to reconcile the conflict and not accentuate it.

3. Granted then that the conflict between the State and the individual must, so far as one can foresee, always exist and granting too that the aim of scientific administration is to reconcile the conflict between the administration and the individual in the most rational way conceivable, I see no objection to administrative law being defined as that "system of legal principles which is mainly concerned in settling the conflicting claims of the executive or administrative authority on the one side and of individual or private right on the other" (a).

Legal obligation of citizens to obey validly passed orders of the administration.

4. The conflict would be nowhere near settlement if citizens were free to claim absolute independence of the Government and were under no obligation to obey validly conceived and promulgated rules and legally competent orders issued by the Government or its authorised agents, and if further these rules and orders were not capable of enforcement by legal sanctions. The only other alternative, force, which is even more readily within the reach of the administration than law, besides being a most unsatisfactory method of settling conflicts, would obviously mean the negation of administrative law. It is with the legal sanctions by which administrative rules and orders are enforced against citizens that the present lecture will be chiefly concerned.

Method of enforcing this obligation not on all points the same as that of enforcing private obligations.

5. The subject would scarcely have needed special treatment if in the matter of enforcing administrative rules and orders the Government had stood in all respects on the same footing as a private individual seeking to enforce a private law right against another private individual.

(i) The administration is often its own law-maker.

6. *First*, as to the rules and orders themselves, I previously pointed out how impossible it is for the legislature directly to frame and promulgate all rules of administrative law and the necessity which compels it to delegate extensive powers of supplementary legislation by ordinances to the executive or different branches thereof. The administration must thus often be its own lawmaker. The power to issue ordinances, if it were without any kind of legal limitation, would without more have meant executive absolutism. In all systems however the lega-

Legal limitations.

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(a) Freund, Introduction to "Cases on Administrative Law".

lity of administrative ordinances is open to attack in courts of law on the grounds, *first*, of their incompetence, and, *secondly*, of their unreasonableness. Administrative ordinances have formed the subject of discussion in a previous lecture and it is not necessary to deal with them in greater detail in the present context (a).

7. *Secondly*, the administration would be impotent which could issue only general administrative ordinances. It would then be only a subordinate branch of the legislature and not an administration. To administer, it must have power to issue special orders addressed to individuals, which if legal the individual disobeys only at his risk. Mr. Goodnow's enumeration of the several varieties of administrative orders to be met with in the administrative system of the United States may be taken as representative of all systems. "Some," he says, "are called orders, others precepts, others warrants and others decisions. Some are in the form of commands to subordinate officers or to individuals to do or to refrain from doing any particular thing, as tax warrants, orders of payment, nuisance-removal and sanitary orders. Some are permissions to individuals to carry on a given business, as for example, licenses and authorisations. Some are acts which create new legal persons, as for example, charters of incorporation. Some are contracts made by the administration for the Government, acting as a subject of private law. Some are decisions as to the existence of certain facts, as for example, assessments, appraisements, classifications of articles for duty in the customs administration; and finally some are appointments to offices or orders to individuals to serve the Government in some capacity, as notices to serve as jurors or in the military service," (b). The order may consist merely in the application to a person of a statutory rule or ordinance which binds such person unconditionally, but more often it involves the performance by the agents of the administration of acts which in their nature are judicial. To insist in all such cases that the administration should resort to courts of law for every decision on disputed facts would obviously lead to administrative deadlock. The administration must have power to exercise this *quasi*-judicial authority, subject however to legal

(ii) Its power to issue special orders.

Varities of special orders.

(a) See Lecture VI *supra*.

(b) Goodnow, Principles of the Administrative Law of the United States, p. 332.

safeguards which themselves constitute an important element of administration according to law.

(iii) Administration may often execute its own orders.

8. Finally, in many cases, it would be plainly contrary to public interests to compel the administration to go through the dilatory processes of the courts of law for the enforcement of its orders (a). The policy of law which discourages self-help as a mode of enforcing private rights has no application in most of these cases. No Government can really do without some power of realising taxes by distress warrants, issued and executed on its own authority, and of abating nuisances. The administration is armed with these powers not as a privilege but as a necessity. Here also, it is in providing legal safeguards against possible abuses of the powers of administrative execution that administrative law finds a special application.

Resulting union of powers.

Safeguards against its abuse.

9. In the public interest, therefore, the administration must, within fairly wide limits, be suffered (i) to make its own laws, (ii) to be judge of its own cause and (iii) to be executioner of its own decrees. No theoretical objection based on the doctrine of separation of powers can really avail to do away with what is imperatively demanded by public necessity. The best service administrative law can perform in this particular field is : (I) *First*, to see that the administration is not allowed to make its own laws, be judge of its own cause and execute its own decrees except where these may be absolutely necessary. It must in other words discriminate (1) between cases where the administration must take the law from the legislature direct and others where owing to the special information at its command the legislature must be content to leave it to the administration to work out in detail the principles which alone the former is in a position to prescribe by statute ; (2) between cases where the rule of law can and should be framed in unconditional language (in which case its enforcement must as a rule be left to the law courts), and cases where that is not possible (in which case necessarily the administration must be given power to exercise a *quasi-judicial* jurisdiction) ; and (3)

(a) It must not be assumed that all varieties of administrative orders stand in need of further execution. The grant or refusal of permits, certificates, licenses and charters of incorporation, for instance, is always a self-concluding administrative act. A breach of a license is of course another matter.

between cases where public interests will not suffer if the administration was to appeal to the law courts for the enforcement of its orders and others where they must suffer irreparable injury if the administration were left to enforce them through the litigious procedure of the law courts. (II), *Secondly*, to permit the testing in a court of law, on the ground of competency or otherwise, of the legality of the rule or order, wherever practicable before execution, and, if not, afterwards. (III) *Thirdly*, where public interests require that the administration itself should exercise *quasi-judicial* functions, by providing that the individual proceeded against should, if practicable, have previous notice and opportunity to be heard, and, if practicable, that the decision be reviewable by a court of law or other authority independent of the authority responsible for the decision in the first instance. (IV) By providing, *fourthly*, that private individuals do not suffer from an abuse of any of these powers, e. g. by laying down strict rules of procedure, the observance of which would go materially to reduce the margin of arbitrary action. (V) *Fifthly*, by not leaving the sanctions to enforce obedience to administrative rules and orders to be determined by the administrative authorities, the same being provided for, as far as practicable, by legislation.

10. As to the matter last mentioned, the general rule, according to Goodnow, is for penalties for disobedience of administrative rules and orders to be provided by law, but that there are a few cases especially in Germany where the administration has the right to sanction its own ordinances and orders (f). The general rule, according to the same authority, also, is to enforce penalties through the law courts, but in Germany frequently and in the United States also, the administration itself may proceed to impose the penalty without resort to the courts, the individual against whom the proceedings are taken having the right to appeal to some judicial body against the action of the administration.

Penalties for disobedience should as far as practicable be provided by legislation and enforced by the judiciary.

11. But quite often the mere enforcement of penalties for disobedience may satisfy the intentions of the law or order so imperfectly that specific execution of the order will be found necessary. When such order directs the payment of

Specific enforcement of orders, how obtained.

money, or when on the failure of the individual, the administration is given power to do the act, charging the recusant individual with the expenses thereof, the order or decision may be enforced as a judgment by execution against his property, but the alternative remedies known to civil law, namely arrest and imprisonment for short terms, should be equally available to the administration. This, according to Mr. Goodnow, is quite common in Germany and not unknown in the United States (a). An additional incentive to the observance of the rules and orders of administrative authorities is found in laws making resistance to the administration or administrative officials acting within their competence a criminal offence (b).

Administrative execution the rule on the Continent but the exception in Anglo-Saxon countries.

12. The greatest difference between the English and American legal systems on the one hand and those of Continental Europe on the other is noticeable in their manner of enforcing execution of administrative orders. Administrative execution, that is to say, execution of administrative orders by the administration itself without resort to courts of law, which is the rule on the Continent, is the exception in England and America. Dr. Gneist was so much struck by this, which he regarded as a peculiarity of the English system and something like an anomaly, that he was led to seek for an explanation of it in its history. The fact that in England the justices of the peace came to perform both judicial and administrative functions, without any clear discrimination between the two, he supposes, accustomed them to enforcing administrative orders according to the forms of law, and judicial execution of administrative orders thus came to be the rule in the English system. But administrative execution is for that reason by no means unknown either in England or in the United States. It is however reserved in these countries usually only for cases where immediate action is absolutely necessary in order to avoid serious danger or inconvenience. In such cases it is usually open to the individual affected to appeal later on to the courts for satisfaction (c).

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 122.

(b) See Lecture XVIII *supra*, paras. 66 to 76.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 126-127.

13. "In all countries," says Goodnow, "this is the method adopted to enforce the payment of direct taxes: The administration steps in and, of its own accord and without the intervention of any other authority, seizes the property of the delinquent tax-payer" (a). The statement commonly found in text books on English constitutional law (b) that "where the subject refuses to comply with what appears to be unjust or illegal demands of the Crown, the ministers and servants of the latter, in order to enforce obedience, must have recourse to ordinary tribunals of justice," is therefore by no means and has never been universally true in England. As a statement of a rule of general application, the proposition is less true to-day in both England and America than it was a century ago, when the doctrine of *laissez faire* controlled the policy of Government, whichever party might be in power, whilst in recent years, the extension of the scope of direct administrative action, under legislative sanction, has been sufficiently marked to provoke adverse comments not only from the public press, but even from judges of superior courts. [ See *Dyson v. Attorney General* (c) ]. To meet what they seem disposed to regard as the beginning of bureaucratic interference with citizens' rights, the judges in England have revived (if indeed they have not invented) a special (equitable) administrative jurisdiction to be considered more fully in a subsequent lecture, under which at the suit of the affected citizen against the Attorney General, as representative of the Crown, they proceed to grant a declaration that the intended action of the authority is or is not in conformity with the law (d). This new remedy is likely to prove useful in checking illegal and arbitrary exercise of administrative action, but it will certainly fail to arrest a movement which is quite in consonance with the spirit of the times (e).

But commonly resorted to to recover direct taxes in all countries.

Its recent extension in England and the remedy devised to control it judicially.

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 128. In Germany, landed property can be seized only as a result of the action of a Court. The Junkers would not allow what at one time was peculiarly *their* property to be subjected to administrative execution. So even they, when their own interests were concerned, were not disposed to regard administrative execution as favourable to individual liberty.

(b) Halsbury, *Laws of England*, Vol. VI, p. 383.

(c) (1911) 1 K. B. 410 at p. 424.

(d) *Dyson v. Attorney General* (1911) 1 K. B. 410 and *the Eastern Trust Co. v. McKenzie Mann & Co. Ltd.* (1915) A. C. 750.

(e) See the speech of Mr. Elihu Root, quoted at p. 100, *supra*, note (c), from his *Addresses on Government and Citizenship*, pp. 534-535.

Its extension in America not arrested by the requirement of due process of law.

14. The movement would have been arrested, if anywhere, in the United States of America, for there, as we found in the previous lecture, the liberty and property of the citizen is guaranteed by the Fourteenth Amendment from interference otherwise than by "due process of law." In England the Parliament being a sovereign legislature, every process, no matter how arbitrary, provided it is sanctioned by statute, is a due process of law, which courts of justice are powerless to question on any ground of morality or policy. But as has been explained in a previous lecture, the courts in America under the Fourteenth Amendment have power to pronounce a rule of administrative law sanctioned by statute invalid on the ground, *first*, that the statute in question has no relation to the performance of some legitimate function of government, and, *secondly*, that even if it has, the means prescribed are not justified in point of moderation and proportionateness by the end in view, that, in other words, the statute is not a reasonable exercise of the "police power" of the State (a).

Due process of law does not necessarily mean judicial process,

15. With powers such as these, and in advertence to the express language of the Fourteenth Amendment, it would have been easy for the Supreme Court to have held that due process of law meant process sanctioned at some stage or other by the authority of a court of law. But both the Supreme Court and the State Courts have refused to hold that a statute deprives a citizen of "due process of law" merely because it vests in administrative authorities the power of making a final *quasi-judicial* determination as to matters within their jurisdiction. All that seems to be necessary, in the view of the courts, to make a final determination of an administrative authority a due process of law is that the defendant should have had notice and opportunity to be heard, *Pennoyer v. Neff* (b). In one case, indeed, a license

(a) Freund, *Police Power*, pp. 15, 58. At one time, in *Munn v. Illinois*, 94 U. S. 113, the Supreme Court of the United States had affirmed that for abuses by the Legislature, "the people must resort to the polls, not to the courts". This view, however, has since been definitely repudiated in a number of cases of which the most notable are *Plessy v. Ferguson*, 163 U. S. 537, and *Corington etc. Turnpike Road v. Sandford*, 164 U. S. 578.

(b) 95 U. S. 714. In England this requirement of notice to validate administrative action is insisted on, wherever the statute does not expressly exclude notice and hearing, where the act is one involving a *quasi-judicial* determination. See *Cooper v. Board of Works for Wandsworth District*, 14

tax was held to have been imposed by due process of law, even though the individual had no opportunity to be heard before the taxing authority, the law having in that case given the individual power to sue out an injunction to restrain the collection of the tax. *McMillan v. Anderson* (a). Thus, provided that the individual had an opportunity to be heard either before the administrative authority or before a court of law, the determination of the administrative authority, on the amount of indebtedness to Government at any rate, is not regarded as contrary to due process of law, and this even if the law provides for the collection of the amount found, summarily without resort to the courts (b).

Opportunity to be heard either before court or before administrative authority held sufficient to make process due process of law.

16. If the requirement of due process of law as thus interpreted has been satisfied, the only manner in which the action of the administrative authorities can be attacked in a collateral proceeding is by questioning their jurisdiction (c), though as the jurisdiction of administrative officers is generally prescribed by statute, the rule of strict interpretation prevails, so that a power to do a particular thing is hardly ever presumed and when relied on must be affirmatively established. However, by a process akin to what is known in French administrative law as "*detournement du pouvoir*" an arbitrary, capricious, inquisitorial or oppressive exercise of discretion is often taken to go into the jurisdiction of the administrative authority, as also is the failure by the administrative authority to follow strictly the procedure provided by statute for the performance of the questioned act. Also where the act or order purports to be that of a board, the

When due process of law satisfied, administrative action open to attack in collateral judicial proceedings for excess and abuse of jurisdiction and failure to follow the direction of law.

C. B. (N. S.) 18) (1863). In that case the judges read into the words of a statute, which taken literally seemed to justify the abatement of nuisance by administrative action without hearing, a qualification "that no man is to be deprived of his property without his having an opportunity to be heard."

(a) 95 U. S. 37.

(b) Goodnow, *Principles of the Administrative Law of the United States*, pp. 335-339.

(c) It is perhaps necessary here to note that where administrative action is challenged on the ground that the statute authorising it was in contravention of the "due process of law", the attack in such a case also takes the same form of questioning the jurisdiction of the administrative authorities. The exercise by courts of their administrative jurisdiction—operating directly by the issue of prerogative writs or otherwise in common law and equity will be considered in the next lecture.



court will hold it to be without jurisdiction, even if the determination was that of a majority, if some members of the board failed to participate in its deliberations altogether (a).

Power given by statute by summary administrative execution to recover debts due to the State and to abate public nuisances upheld as not contrary to due process of law.

Risks to officials carrying out summary administrative execution.

17. As to administrative execution, the Fourteenth Amendment has not prevented the Supreme Court of the United States from upholding the summary execution by the administration of its orders in some classes of cases, as being within the competence of the administrative authorities. Thus in *Murray's Lessee v. The Hoboken Land & Improvement Co.* (b) that court observed: "We apprehend that there has been no period since the establishment of the English monarchy when there has not been, by the law of the land, a summary method for the recovery of debts due to the Crown." Summary administrative proceedings to abate public nuisances have been similarly upheld on the ground that the private rights secured by constitutional guarantees are such only as existed at common law, and the common law of England has never insisted on exigent demands of public health, public morality and public safety being postponed to considerations of private rights (c). But in America, as in England, the possession of such summary powers of administrative execution is a dubious privilege to officials called upon to execute them, for the determination of an administrative authority not being regarded as final and conclusive *unless made with notice and opportunity to the individual affected to be heard*, the legality and propriety of the action may be challenged in a suit for damages, in which the *onus* is thrown on the administrative officer to establish not merely that he acted strictly within the authority given by the statute, but also that the thing acted against was what is specified in the statute. Where property has been destroyed as a nuisance in exercise of such summary powers, it is no defence to an action for damages merely to say that the administrative authority acted in good faith with reasonable cause to believe that the thing proceeded against was actually a nuisance,

(a) Goodnow, *Principles of the Administrative Law of the United States*, pp. 342-344.

(b) 18 How. 272 (1855).

(c) *Laaton v. Steele*, 152 U. S. 183 (1894) is the leading case on the point.

if in fact it was not. Moreover, liability in damages has been decreed even in cases of proved nuisance, where milder measures than the destruction ordered by the administrative authorities would have sufficed to abate it. It follows from this, that administrative officers stand to suffer less when the statute prescribes notice and provides an opportunity of a hearing to the persons concerned before an administrative authority, in which case statutory provision declaring its determination to be final would afford protection to the officials sufficient for all practical purposes (a).

A hearing before an administrative authority benefits citizens & officials equally.

18. It has been observed that when independent administrative action depending upon the exercise of *quasi-judicial* functions is questioned in a collateral proceeding, the matter is viewed by courts of law in England and America as essentially one of jurisdiction. From a consideration of the extraordinary administrative jurisdiction of the superior courts in those countries (a subject which will be discussed in the next lecture) it will further appear that the direct control of these courts over the administration is also on the whole confined to the rectification of errors of law and jurisdiction. These courts therefore do not ordinarily review administrative decisions from the point of view of their correctness in fact or their expediency. This defect has been partially removed in England by the establishment of the courts of quarter sessions which hear appeals from the decisions of the justices of the peace in matters which concern the administration. The defect hardly exists in those countries where administrative courts have been set up to review official decisions affecting private rights, for these courts can consider both the facts and the law involved in such decisions. The character of the control exercised by ordinary and administrative courts in the several systems of administration under examination will be dealt with in the next lecture, and need not be gone into in this place.

Judicial review of administrative action less sufficient in England and the United States.

There are countries possessing administrative courts.

19. There remains only to note briefly the special features of administrative action in British India, which distinguish it from similar action in England. The general prin-

Administrative action in India.

(a) Goodnow, *Principles of the Administrative Law of the United States*, pp. 362-365. Also cases collected in Ch. VI of Freund's *Cases on Administrative Law*.

ciples and methods of procedure are those derived from English administrative law but important departures therefrom have been sanctioned by statute, particularly in recent years. Adverting to the fact that the law-making bodies in India are not sovereign legislatures and to the reservation contained in sec. 65 of the Government of India Act of 1915 (first formulated in sec. 43 of the Government of India Act of 1833), according to which it is beyond their competence to make any laws "affecting any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom", I drew attention in the previous lecture to the inadequate uses to which the judiciary in India has put the above provision of the Parliamentary constitution of British India in the direction of restraining administrative interference with subjects' rights (a). In practical result, this salutary check on the Indian legislative bodies has remained a dead letter, and leaving aside the provision of sec. 32 (2) of the Government of India Act of 1915, under which, according to the interpretation placed upon it and other provisions of the Act in *Secretary of State for India v. Moment* (b), no person can be deprived of his right to sue the Government of India in the same manner and to the same extent as he might have sued the East India Company, there seems to be no limitation upon the power of the Indian legislative bodies to authorise the administration to determine finally what disputed questions of fact and law they please, arising in the course of administration, even though they may touch and concern the most valued rights of the citizens. There is apparently too no limitation to the powers of administrative execution which the legislature may confide without fear of challenge in the hands of the authorities.

Typical instances of administrative action authorised under judicial safeguards.

20. The tendency, however, of early Indian legislation, when conferring large powers of interference on the executive, was to provide at the same time such judicial safeguards as usually accompanied similar delegation of powers in England. A very good illustration of this type of legislation is to be

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(a) See *supra*, Lecture XXI para. 18.

(b) L. R. 40 I. A. 48 (1912).

found in the Revenue Sales Act XI of 1859 of Bengal. Under this Act, arrears of land revenue are realisable by sale in administrative execution of the defaulting estate to be carried out according to formalities minutely prescribed in the statute some of which are regarded as mandatory whilst others are treated as directory only. When a sale of the defaulting estate has thus taken place, the disseized proprietor is entitled to appeal to the administrative authorities for annulment of the sale. If the appeal is unsuccessful, then and then only can he sue in the Civil Court for the same relief and on the same grounds that he had urged before the administrative authorities. In spite of the provision which makes an appeal on the same grounds to the administrative authorities a condition precedent to the civil court's jurisdiction to set aside the sale, it has been held by the courts in India, with the approval of the Privy Council, that a sale effected when in fact there is no arrear is absolutely without jurisdiction and is liable to be set aside at the suit of the aggrieved proprietor, although no application to set it aside has been preferred before the revenue authorities (a). The Bengal Public Demands Recovery Act (III B.C. of 1913) is another example of authorised administrative action and execution without reference to courts of law, but the provisions of the Act permitting appeals to superior authorities and in certain circumstances to the civil courts are framed on a more generous scale than they were in the Revenue Sales Act of 1859 just noticed.

Revenue Sales Act of Bengal (Act XI of 1859).

Bengal Public Demands Recovery Act (III B. C. of 1913).

21. Typical instances of powers of administrative decision and action without reference to courts of law will be found in the various provincial enactments constituting the municipal and rural boards. These boards assess and impose rates, tolls, taxes etc., and recover them by distress and, in certain circumstances, by sale even of the defaulting holding. The assessment of rates takes place according to a *quasi-judicial* procedure before an administrative authority, subject in most cases to an appeal to a higher authority. Almost all the Municipal Acts expressly provide that the assessment, revision or demand of tax or toll, when no complaint

The municipal and rural boards statutes.

(a) *Balkishen Das v. Simpson*, L. R. 25 I. A. 151 (1898), *Haridasi v. Dhiraj Chandra*, L. R. 29 I. A. 290 (1914).

or objection is made as provided by the Act, is final (a). But this finality does not, upon principles previously explained, attach to assessments or demands made without substantial compliance with the provisions of the law and they are liable to be challenged in the civil courts on the ground that the action taken was either in excess or in contravention of the powers conferred by the statute (b). *A fortiori*, a suit lies to recover taxes illegally levied and paid involuntarily and under protest.

The Income  
Tax Act  
(II of 1886).

22. Attention may usefully be drawn in the present connection to the provisions of the Income Tax Act, II of 1886. The tax is assessed upon notice to the assessee and after considering his objections, and in case of default of payment, the Collector is authorised to recover the tax with penalty without reference to the civil court, in the same manner as if it were an arrear of land revenue, or by any process enforceable for the recovery of an arrear of any municipal or local rate or as if the same were due under a decree of a civil court, the Collector being himself invested with the powers of a civil execution court for this purpose (sec. 30). It is finally expressly provided that no suit shall lie in any civil court to set aside or modify any assessment made under the Act. But this, it is clear, does not prevent the assessee, either before or after the tax has been realised, from challenging the validity of the imposition on the ground that the revenue authorities had not acted in substantial compliance with the provisions of the Act.

Types of ad-  
ministrative  
action  
authorised by  
statute  
without  
adequate  
judicial safe-  
guards.

23. It seems obvious that none of the statutes just considered would have failed to survive the test, which they would have to undergo in the United States of America, of not being in contravention of the requirement of due process of law.

(a) Aiyangar's "Municipal Corporations in British India," Vol. III, p. 146, note 80, where the provisions of the various Municipal Acts to this effect are collected. Sec. 162 of the Calcutta Municipal Act (III B. C. of 1899) provides for a judicial review of valuations of holdings made for taxing purposes by Courts of Small Causes.

(b) *Chairman of Giridih Municipality v. Srish Chandra*, I. L. R. 35 Cal. 859 (1908); *Municipal Council of Tanjore v. Umamba Bai Sahib*, I.L.R. 28 Mad. 523 (1889); *Municipal Council of Cocanada v. Standard Life Ass. Co.*, I.L.R. 24 Mad. 205 (1900); *Municipality of Wai v. Krishnaji*, I. L. R. 23 Bom. 446 (1894); *Morar v. Borsad Municipality*, I. L. R. 21 Bom. 607 (1900); *Kasandas v. Ankleswar Municipality*, I.L.R. 26 Bom. 294 (1901).

More doubtful however than these are provisions of which sec. 99 of the Calcutta Police Act (IV B. C. of 1866) is the type, providing that the plaintiff in every action which may be lawfully-brought against any person for anything done or intended to be done under the provisions of the Act must expressly allege in his plaint that the Act complained of was done maliciously and without reasonable or probable cause, and be non-suited on failure to establish those allegations. The effect of this is that mere proof that the act in question was not in substantial compliance with the provisions of the statute, in other words that it was *ultra vires*, would be of no avail to the plaintiff (a).

The Calcutta  
Police Act  
(IV of 1866  
B. C.)

24. Contrast with this the provisions of secs. 140 & 142 of the Criminal Procedure Code which give a magistrate who has forcibly caused the removal of what he has been led to conclude was a public nuisance immunity from action "in respect of anything done in good faith under the provisions" of those sections. The legislature responsible for the latter enactment was evidently less disposed to take on trust the good faith of magistrates than were the framers of the Calcutta Police Act to take that of the policemen of Calcutta.

The Criminal  
Procedure  
Code (Act V  
of 1898)  
Ch.X.

25. The Provincial Excise Acts furnish interesting study in the present connection. In 1878, both the Bombay and the Bengal legislatures passed Excise Acts, Nos. V and VII of their respective Councils. In the Bombay Act there was a provision (sec. 76) which barred all action in a civil court against the Government (b) or any excise officer for damages for any act *bona fide* done or ordered to be done in pursuance of that Act or any other law relating to the excise revenues. No similar provision appeared in the Bengal Act and Bengal did not until 1909 and East Bengal and Assam until 1910 think of

The Pro-  
vincial Excise  
Acts.

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(a) No such provision occurs in the Police Act V of 1861 which is of general application. Under 1 Geo. St. 2. c. 5, sec. 3, constables are absolutely protected in the case of rioters being killed, maimed or hurt while they are engaged in suppressing a riot. Save and except this, police officers in England enjoy such qualified protection only as is afforded by the Public Authorities' Protection Act 1893, the provisions whereof were briefly outlined in Lecture XVIII *supra*, para. 65.

(b) Since the decision of the Privy Council in *Secretary of State v. Moment*, L. R. 40 I.A. 48 (1912), the provision of the section in so far as it bars all actions against the Government must be held to be *ultra vires*.

throwing round their excise administrations the armour of immunity which the excise administration of Bombay had been carrying since 1878. But the Madras Council by sec. 72 of its Act I of 1886, the Council of the United Provinces of Agra and Oudh by sec. 78 of its Act IV of 1910, the Bengal Council by sec. 91 of its Act V of 1909 and the Council of East Bengal and Assam by sec. 78 of its Act I of 1910, ranged themselves in this matter of providing immunity from action to excise officers alongside of the Legislative Council of Bombay, so that at the present moment no excise officer anywhere in British India can be made to pay damages for the wrongful exercise of his powers except in those rare cases in which, by accident or luck, the plaintiff is enabled to discharge the onus which in the result falls upon him of proving that the official in question had acted not only illegally but also from unworthy motives (a). The powers which excise officials are enabled to exercise under these statutes are very drastic, but hardly more so than the powers conferred on the administrative authorities under the Press Act, I of 1910. Sec. 22 of that Act, however,

The Press Act  
I of 1910.

(z) Strictly speaking, the onus, once it is made out that the act was illegal, should be (upon the principle of *Armory v. Delamirie*, 1 Str. 501 (1722)) on the wrongdoing official, since no presumption is to be made in favour of a wrongdoer. But the only evidence in most cases to prove the character of his motive would be his own personal testimony, which he may give or keep back as may suit his own case. As I understand these and other similarly worded statutory provisions, they confer, in the first place, complete immunity on officials in respect of illegal acts done in a high-handed manner from excess of official zeal. Why such acts should be protected it is not easy to see. Next, as to proving the *mala fide*s of acts done in the professed exercise of statutory powers, ordinarily it would be beyond the power of any plaintiff to do it unless the defendant should have obligingly come forward and confessed. With the provision just considered may be compared those of 53 & 54 Vict. c. 21 under which in England customs and excise officers are absolutely exempted from suit or action for illegal seizure (only) or (under 39 & 40 Vict. c. 36, sec. 203) for stopping carts and waggons to search for smuggled goods, though none be found, where a judge certifies that there was probable cause for the seizure or search. Similar provisions will be found in the Merchant Shipping Act, 57 & 58 Vict. c. 60 sec. 76. The difference between the Indian and the English enactments is obvious. Provisions bearing the closest resemblance to the former will be found in England in the Public Health Acts, which, with ampler justification than the Indian Excise Acts, confers immunity on officers acting under those Acts, if the matter or thing were done *bona fide* for the purpose of executing the Acts. Chaster, Public Officers, pp. 636, 637. See *supra*, Lecture XVIII, para. 61, note.

provides that except as provided by that Act (and that does not really amount to much) no civil or criminal proceeding shall be instituted against any person "for anything done or in good faith intended to be done" under the Act. This section seems apparently to dispense with the requirement of good faith for anything done illegally in pursuance of any purpose authorised by the Act, and to make good intention alone sufficient to procure immunity for anything done *ultra vires* of the Act, though in the erroneous belief that the act was authorised by the statute. I surmise, however, that the expression just quoted was intended to convey the same meaning as the provision in sec. 11 of the Defence of India (Criminal Law Amendment) Act, IV of 1915, which says that no order under that Act "shall be called in question in any court and no suit or prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under the Act."

Defence of  
India Act,  
IV of 1915.

26. The Calcutta Police Act, the Provincial Excise Acts, the Press Act and the Defence of India Act do not provide a pleasing subject of study in legislative tendencies. The larger the powers conferred on the administration to interfere extra-judicially with citizens' rights, the more stringent ought to be the legal safeguards provided against their possible abuse. But the Indian legislatures seem to be following the opposite course of coupling all grants of large powers with the gift of an equally generous measure of immunities to the agents of the administration for carrying out those powers. So far as the statutes go, these agents appear to be left free to use or abuse their powers without being accountable for the consequences, in a court of law, to the only persons vitally interested in their lawful exercise, that is to say, the individuals against whom they are directed. To this extent, therefore, the statutes tend to nullify the "rule of law," and not the less so because they are disguised as grants of apparently legal powers under statutory delegations. The grant of large powers coupled with immunity as regards the manner of their exercise, even when authorised by a representative legislature (and the legislatures in India are not representative), would still be a grant of arbitrary powers contrary to the spirit of English public law.

Danger of  
joining immu-  
nity from  
action with  
large grants  
of powers.



actions to be brought in the ordinary courts against them for stepping beyond the limits of law in the exercise of their functions as officers of the Government. The extent to and the manner in which in different systems, government officers of various grades are allowed to be proceeded against in civil and criminal actions, I have dealt with in previous lectures (a).

4. The law may also provide for the enforcement of strictly administrative rules and orders commanding the citizens' obedience, through the ordinary legal machinery of the law courts. In such proceedings, which may be either civil or criminal, either the State *eo nomine* or some agent of the administration may set the law in motion against the offending citizen, leaving it to the courts to grant or refuse the relief asked for, and to work out the decree or order passed by the courts by the ordinary machinery of judicial execution. As a litigant before its own courts, a State may be, and generally is, as I have pointed out before, allowed certain procedural and other privileges which are denied to the ordinary litigant. But there may also be, and in fact there are, differences which touch the substance of the relation between the Government and the citizen, imposing serious-qualifications upon the accepted notions of the "rule or law."

Procedural and other privileges accorded to the administration and its officials.

The problem of controlling administrative discretion.

5. The crux of the problem lies in the necessity, which exists in the public interest to delegate to the administration large measures of discretionary authority. The grant of such authority does not imply that its exercise one way or the other is to be viewed without concern by either the State or the individual. The judicious exercise of discretionary powers by administrative authorities can no more be regarded with indifference by the parties affected than the exercise of similar powers by the judiciary. The well-being of a community may depend more upon the due performance of discretionary duties than upon a strict adherence to the forms of law. And yet, when the will of an administrative authority has been done and executed in pursuance of a discretionary duty, the general rule of Anglo-Saxon law, even where it permits such

Non-interference with administrative discretion by Anglo-Saxon courts.

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(a) See Lectures XIV to XIX *supra*. The Anglo-Saxon system provides a method by which an agent of the Government or a public body may be compelled to perform a duty imposed on him or it by law by courts of superior jurisdiction. This falls within the latter's administrative jurisdiction—a topic to be presently considered.

acts to be collaterally questioned, is, as we have seen before, to restrict the interference of the courts of law within very narrow bounds. It often requires practically an absolute overstepping of their jurisdiction and, where they have acted within it, corruption, to found the responsibility of officials in civil and criminal actions.

6. It should be further remembered that the general rule in Anglo-Saxon countries is to hold the Government itself free from responsibility for damages caused to individuals by its agents wrongfully in the performance of their official duties. What remedy the individual has, he has against the offending official, and a decree for damages against him may often prove of no real value. A successful civil or criminal action against an official may no doubt act as a salutary deterrent upon him and his fellow officials in their future actions, but the successful plaintiff in such cases often has but the sense of having performed a public service as his only consolation for the injury he has suffered and the expenses he has incurred in vindicating the law. Such remedies, therefore, as are provided by the challenge to which the actions and decisions of administrative authorities are subject in such collateral proceedings must thus prove a most inadequate means of enforcing the "rule of law," if that rule means not merely the letter but also the spirit of the law—which is justice.

General non-liability of Government for wrongs of its agents in the Anglo-American system.

7. Unless, therefore, some means were found to enable the courts to exercise a more direct control over the acts of the administration, there would be little to boast of the rule of law which is claimed to be the governing feature of Anglo-Saxon administration. "It is not just," says Goodnow, "to tell an individual that he must wait until his right has been violated and then sue the proper official for damages, or even prosecute him criminally. The individual desires a definite thing done by the administration which the law says shall be done. Again, it may be of vital importance that an officer be prevented from doing an act which he threatens to do, or that a decision which is regarded as unfair or illegal be reviewed and annulled or amended. Here, it is not right to force the individual to rely solely on his power to sue the officer in damages or prosecute him criminally" (a).

Need for direct control by courts of the administration.

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(a) Goodnow, *Principles of the Administrative Law of the United States*, p. 419,

The adminis-  
trative juris-  
diction of  
English civil  
courts.

8. These remedies are to be found in Anglo-Saxon countries in the exercise by the Superior Courts of their administrative jurisdiction, in common law and equity, and similar jurisdictions conferred on these and inferior courts by statute. Whether these by themselves prove wholly adequate for fulfilling the rule of law, in spirit as well as in letter, will need examination. But some idea of the nature of this jurisdiction must be formed before we can embark upon such an inquiry.

Its origin.

The Court  
of King's  
Bench.

9. I have previously pointed out how in England Royal power chose to consolidate itself from the very beginning through the courts of law. The court of King's Bench in fact constituted the chief visible embodiment of Royal authority, so much so, that the Crown by a fiction of law was supposed always to be present in it. It is not surprising therefore that its authority to exercise a supervisory power over all other authorities was at no time seriously challenged. The relation in which this court stood towards the Crown did not at the same time exclude the exercise by the latter of direct administrative control over public authorities without the intervention of the Court of King's Bench. This administrative control in so far as it was exercised by the Chancellor, in course of time, assumed judicial form, and alongside of the control exercised by the common law courts, the Chancellor granted equitable relief against administrative action according to its own procedure. Administrative control of a more direct character continued to be exercised by the Court of Star Chamber (a division of the Privy Council) over the action of the Royal authorities in the localities. The existence side by side of two classes of authorities, one mainly judicial and the other mainly administrative, had a natural tendency to specialise the character of the control exercised by each. The methods of the courts of common law and equity naturally assimilated themselves more and more to those employed in dealing with the actions and decisions of inferior judicial tribunals, originally independent but gradually brought under the control of the superior courts by the application of the principle previously discussed that the King is the fountain of all justice. Whilst the grant of relief by these courts against administrative action thus became less capricious in character, and the writs and processes formerly viewed

The Chan-  
cery Court.

Methods of  
Courts of  
Law &  
Equity and  
Court of  
Star  
Chamber  
contrasted.

as resting in the absolute discretion of the courts assumed more and more the character of writs of right grantable for good cause, the causes themselves for which they could be granted came to be of a somewhat exceptional character. It will be seen presently that as a rule these courts refrained from interfering with the discretion of the administrative authorities. The Court of Star Chamber, on the other hand, felt no hesitation in reviewing the acts and decisions of the authorities on questions of fact and expediency as well as of law. Competent authorities have borne testimony to the fact that during the Tudor and Stuart regimes the Court of Star Chamber was well on the way towards constituting itself into an administrative court reviewing the acts and decisions of administrative authorities on fact as well as law, and according to a procedure which increasingly tended to assume judicial form. The Court of Star Chamber did in fact remove many defects of the administration and of administrative law better than the courts of common law could have done. But unfortunately for the nation, it fell foul of private rights in its administration of the criminal law (a). The abolition of the Court of Star Chamber in 1640 and the complete independence attained by the judiciary in the course of the next sixty years took away all chances of the natural evolution in England of an organised system of administrative courts. The void left by the dissolution of the Star Chamber was partially filled by constituting the justices of the county into Courts of Quarter Sessions and authorising them to hear appeals from such orders passed by the justices of the peace individually or in petty or special sessions as affected property and the right of personal liberty. Such direct judicial control as is now exercised in England is by the Superior Courts through their extraordinary administrative jurisdiction and by the Courts of Quarter Sessions under authority conferred by statute.

The abolition  
of the Court  
of Star  
Chamber.  
Its effect.

10. The competency and jurisdiction of the Superior Courts when exercising their administrative jurisdiction appears to an outsider at any rate to be needlessly complicated and obscure. The writs and remedies which appear to have grown up each by its inherent necessity seem to overlap and the rules evolved to prevent a conflict of remedies and jurisdictions are sometimes

The ad-  
ministrative  
jurisdiction  
of Superior  
Courts in  
England  
complicated  
and over-  
lapping.

(a) Redlich & Hirst, *Local Government in England*, Vol. II, pp. 360-364.

extremely perplexing. Only a broad description of their respective characteristics and uses can be attempted at this place. First then as to common law writs (a).

*Habeas corpus ad subjiciendum.*

11. The writ which figures most prominently in English constitutional history, and deserves priority of attention for that if for no other reason, is the writ of *habeas corpus ad subjiciendum*—a remedial mandatory writ by which the High Court and the judges of that court at the instance of an aggrieved subject command the production of any person alleged to be in unlawful detention whether in a public prison or in private custody with a view to enquire into the legality of his detention. In any matter involving the liberty of the subject, the action of the Crown or its ministers and high officials of the Privy Council or the executive Government is subject to the summons and control of the judges on *habeas corpus*. The writ is a prerogative writ i. e., one issued upon cause shown in cases where the old legal remedies are inapplicable or inadequate, but is grantable *ex debito justitiæ* though not of course. The writ, besides the part it played in the constitutional struggle between the people and the Stuart Kings, did good service about a century or more ago in freeing aliens brought to England in a condition of slavery, and is found useful at the present moment in the field of administrative law in cases of illegal commitments by naval, military and ecclesiastical courts and of commitments for extradition and of fugitive offenders (b). In America the writ has been used to test the validity of detention by immigration officials (c) and there is evident scope for its use in similar proceedings in England.

Present uses of the writ.

Writ of *mandamus*. Specific uses of the writ.

12. There is, next, the writ of *mandamus*. As to this, it is stated to be “a high prerogative writ of a most extensive remedial nature and is, in form, a command issuing from the High Court of Justice directed to any person, corporation or

(a) The account given in Halsbury's *Laws of England*, Vol. X, Title, “Crown Practice,” is well-arranged and fairly full and is strongly recommended to students desirous of acquiring a good working knowledge of these writs, which is essential to an understanding of the present topic. Bailey's *Treatise on the Law of Habeas Corpus and Special Remedies*, an American treatment of the same subject, should be consulted for purposes of comparison.

(b) Halsbury, *Laws of England*, Vol. X, pp. 39-41, 49-51.

(c) See *infra*, para. 36.

inferior court, requiring him or them to do some particular thing therein specified, which appertains to his or their office, is in the nature of a public duty, and is consonant to right and justice. Its purpose is to supply defects of justice, and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right, and it may issue in cases where although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual."

13. A *mandamus* will thus lie to compel the restoration of a person to an office or franchise whether spiritual or temporal of which he has been wrongfully dispossessed, provided such an office or franchise is of a public nature. It will also lie to admit to such an office or franchise a person who has a right thereto but has never had possession. When, however, the office in question is neither a corporate office nor a permanent one, but one which is merely temporary, depending upon the will of a fluctuating body, no *mandamus* will lie to restore or admit thereto. A *mandamus* will lie to command an election to an office of a public nature, *e.g.*, of members of a public body, but not of members of an indefinite body. No *mandamus* will however be granted to restore, admit or elect to an office unless such office is vacant. If the office is in fact full, proceeding must be taken by way of *quo warranto* or election petition to oust the party in possession. A writ of *mandamus* will be granted ordering that to be done which a statute requires to be done, whether or not the party or corporation on whom the duty is imposed be a public official or an official body, and public officials and public bodies who have failed to perform any public duty with which they have been charged will be compelled to discharge it by a writ of *mandamus*. A *mandamus* will also issue to tribunals exercising an inferior jurisdiction commanding it to adjudicate according to their powers in matters which are judicial in their character. But no officer, public body or court can be compelled by *mandamus* to exercise merely compulsory powers, nor will such a writ direct any such body or authority as to the manner in which they are to exercise their discretion.

Specific uses  
of the writ,

14. No court can compel the Sovereign to perform any duty and no writ of *mandamus* will lie to the Crown, nor will a writ lie against a Secretary of State in his capacity as agent

Against  
whom *mandamus*  
does not  
issue.

of the Crown or to any person acting as a servant of the Crown, nor against ministerial or inferior officers bound to obey the orders of a competent authority to compel him to do something which is part of his duty in that capacity. Where however Government officials have been constituted agents for carrying out particular duties in relation to subjects whether by Royal charter, statute or common law, so that they are under a legal obligation towards such subjects, a writ of *mandamus* will lie for the enforcement of such duties (a).

No *mandamus* where it would be futile or where there are other sufficient remedies.

15. A *mandamus* will not go when it appears that it would be futile in its result. Moreover, the court will as a general rule and in the exercise of its discretion refuse it when there is an alternative specific remedy at law which is not less convenient, beneficial and effective, such as petition of right, *quo warranto*, *quære impedit*, *certiorari*, appeal to Quarter Sessions and execution, even though fruitless in its results. Nor will the court interfere to enforce the law of the land by this extraordinary remedy in cases where action at law will lie for complete satisfaction. The existence of a remedy in equity is said not to be an answer to an application for a *mandamus*. But *mandamus* will not issue where the statute which creates the obligation also provides the remedy for its enforcement. But the existence of a remedy by indictment which only results in the punishment of the delinquent official is not considered a sufficient answer to an application for *mandamus* (b).

*Quo warranto*.

16. As information in the nature of a *quo warranto*, which is the modern form of the obsolete writ of *quo warranto* though in form a criminal proceeding has long been applied to the mere purpose of trying the civil right to an office or franchise and is now under statute declared to be civil proceeding whether for purposes of appeal or otherwise. It lies only in respect of offices created by charter from the Crown or by statute, the duties whereof are of a public nature, and the tenure of which is permanent in the sense that the incumbent does not hold at somebody's will or pleasure. The person proceeded against must be in actual possession and use of the office in question to justify an information in the nature of a

Its present uses.

(a) Halsbury, Laws of England, Vol X, pp. 77-104.

(b) Halsbury, Laws of England, Vol. X pp. 128-136.

*quo warranto*. Proceedings by way of *quo warranto* are excluded by statutes providing for the decision of disputed municipal elections by election petitions, nor is it considered appropriate where the office in question is of an eleemosynary character. Finally the *quo warranto* procedure is not permitted for the purpose of indirectly attacking the legality of the charter of incorporation. An information in the nature of *quo warranto* lies at the instance of the Attorney General or a private relator who has some interest in the matter. But to attack the possessor of an office in the corporation of a borough, the relator need not be a burgess. It is sufficient if he is an inhabitant subject to the Government of the corporation or owns rated property even though not qualified to vote. In several jurisdictions in the United States, the right to apply for a *quo warranto* is given exclusively to the State Attorney, and the exercise of this power by the State Attorney has been variously interpreted as being in its nature discretionary or ministerial with the consequence that private parties have in some jurisdictions been denied *mandamus* on the State Attorney to file an information whilst the same has been granted in others (a).

Right of private persons to apply for writ in England.

Denied in most jurisdictions in America.

17: The writ of prohibition is a prerogative writ issuing out of the High Court of Justice and directed to an ecclesiastical or inferior temporal court, which forbids such court to continue proceedings there in excess of its jurisdiction or in contravention of the law of the land. If the issue of this writ had been confined only to courts strictly so called, its importance from the point of view of administrative law would not have been very great. But though it will not issue to "any person or body of persons who may be acting judicially but not as a judicial tribunal, nor against the ministerial or executive acts of the government," where by Act of Parliament, a body of persons has the power of imposing an obligation upon individuals (who are parties to the proceedings) the High Court, it is said, will exercise as widely as possible the power of controlling such a body, if it attempts to exceed the jurisdiction prescribed by such Act or usurps a jurisdiction of a judicial character.

The writ of prohibition.

When it will issue against administrative authorities.

(a) *People ex rel. Demarest v. Fairchild*, 67 N. Y. 334 (1876); *People ex rel. Raster v. Healy*, 230 Ill. 280 (1907).



When writ  
lies.

18. Prohibition lies not only for excess or absence of jurisdiction but also for contravention of some statute or principle of common law. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of proceedings. It lies against the judge of an inferior court where such judge is interested in the suit. Where the judge of an inferior court has given himself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie, but a writ will not be granted where the judge (except upon very strong grounds), for the purpose of ascertaining whether he has or has not jurisdiction, has decided a question of fact upon conflicting evidence (a).

Writ of *certiorari*—Its wider operation as contrasted with prohibition.

19. A writ of *certiorari* is of wider operation than a writ of prohibition, for it lies in respect of any judicial as distinguished from a ministerial act. Any body of persons which possesses authority from the Crown to perform judicial as distinguished from ministerial acts constitutes a court so as to be amenable to this writ. The most important purposes served by this writ are (i) to remove for trial by the High Court civil actions and indictments and (ii) to remove for quashing. A trial is removed by the writ, if it is shown that a fair trial will not be had or complete justice done in the inferior court. *Certiorari* to quash issued at common law only where the writ of error did not lie. It does not therefore lie to quash the judgments of inferior courts of civil jurisdiction. But it lies to remove for the purpose of quashing the determinations of persons or bodies who are by statute or charter entrusted with judicial functions out of the ordinary course of legal procedure but within the general scope of the common law. The determination of such authorities are not judgments in the sense required to admit of a writ of error being brought in respect of them. Thus the determination of the Royal College of Physicians, of Commissioners of Sewers, of Canal Commissioners empowered to hold inquiries with regard to the construction of bridges, of Sheriffs empowered to hold inquiries under the Land Clauses Consolidation Act of 1845 may be removed in order to be quashed. *Certiorari* finally lay for removing convictions and orders or other determinations of justices of the peace in which a case had been granted by the

Its uses to quash decisions of administrative authorities.

justices or the Quarter Sessions. The writ however is now not necessary (though it is not excluded) where a case has been granted by the justices of the peace or the Quarter Sessions. The legislature in some cases has expressly provided that the remedy of *certiorari* shall be open to aggrieved parties for the purpose of quashing certain proceedings. For instance under the Poor Law Amendment Act of 1854, secs. 105, 106, any person aggrieved by orders of the Local Government Board may apply for *certiorari* to remove them into the High Court. On the other hand, *certiorari* has by statute been "taken away" in many instances. But it has been held that even in such cases *certiorari* may be granted where the inferior court has acted without or in excess of jurisdiction. Statutory restrictions imposed upon the issue of the writ in particular cases must of course be given full effect.

Statutory  
*certiorari*.

20. A *certiorari* is granted as of course upon the application of the Attorney General acting on behalf of the Crown in all cases in which the court has jurisdiction over the subject matter of the proceedings in the inferior court. In most other cases, the writ is discretionary. Where the writ is discretionary it will nevertheless be granted *ex debito justitiæ* to quash proceedings which the court has power to quash where it is shown that the court below has acted without jurisdiction or in excess thereof, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party has not been such as to disentitle him to relief, and this (as already stated) even in cases where *certiorari* has been expressly taken away by statute. The writ is never given at the instance of the party in whose favour the error was made. It will also not be given where it appears that no benefit will arise from granting it or where the proceeding attacked is not voidable only but void.

*Certiorari* as  
a matter of  
course to  
Crown.

Discretionary  
in other cases  
but *ex debito*  
*justitiæ* when  
jurisdiction  
wanting.

21. Defect of jurisdiction for which *certiorari* will issue may arise from the nature of the subject-matter or from the absence of some essential preliminary proceeding. Under various statutes certain notices are requisite before the commencement of proceedings and the omission to serve such notices deprives the inferior court of jurisdiction and affords ground for *certiorari*. When, moreover, the jurisdiction of the inferior court depends upon the existence of some particular fact, if the fact be collateral to the matter

Variety of  
ways in which  
want of juris-  
diction may  
arise.

which the lower court has to try, that court cannot by a wrong decision with regard to it give itself jurisdiction which it otherwise would not possess, but if the fact be a part of the very issue which the lower court has to enquire into, a *certiorari* will not be granted though the lower court may have arrived at an erroneous conclusion with regard to it.

Ouster of jurisdiction by subsequent event.

22. In some cases, the jurisdiction of the inferior court rightly assumed may be ousted by facts proved in the course of the inquiry, as for instance where the jurisdiction of justices was ousted at common law by a *bona fide* claim of title on the part of the defendant.

Non-judicial grounds for grant of *certiorari*.

23. *Certiorari* will always be granted to quash the determination of an inferior court if it be established that the judge had a direct interest in the subject matter of the inquiry, or on the ground of collusion, corruption or any other like ground on the part of the prosecutor. *Certiorari* is also granted where upon the face of the proceedings themselves it appears that the determination of the inferior court is wrong in law.

Where *certiorari* will be refused on grounds of public policy.

24. There are however certain acts with regard to which, upon grounds of public policy, the writ will be refused irrespective of the question whether the acts are of a judicial or ministerial character. Thus *certiorari* will not be granted to bring up a provisional order by a Secretary of State which is subject to confirmation by Act of Parliament, for to issue the writ in such a case would be to interfere with the functions of Parliament. *Certiorari* will not lie to remove assessments to the land tax, because to remove them would occasion grave public inconvenience (a).

Processes in equity.

25. The above brief and inadequate description of the prerogative writs is all that can be given here, though I should like Indian students to familiarise themselves with them more intimately by a study of English and American text books, since, as will be presently seen, they are not unknown to Indian law. The processes of Chancery Courts by which they could, and courts possessing jurisdiction in equity can to-day, control administrative action are (1) the injunction and (2) declaratory suits against the

Attorney General as representing the Crown or the department concerned. An injunction, it is hardly necessary to mention, is a judicial process by which a party is ordered to do or refrain from doing a particular act or thing. Formerly granted very cautiously and at the absolute discretion of the court, it has, like the prerogative writs already dealt with, come in recent times to be treated as grantable of right in all proper cases. All that needs to be particularly noticed here is that an injunction will not be granted if it should involve an interference with the public duty of a department, but in a proper case, it will, it is said, be granted to restrain a department of Government from doing a mere ministerial act, if it does not involve an interference with the public duty of the department (a). It is to be noticed further that the court has no jurisdiction to prevent the commission of an act which is merely criminal or illegal and does not affect any right to property.

Injunction.

Limitations to its issue against administrative authorities.

26. The injunction, it should be remarked, is more far-reaching in its operation than the prohibition, for whilst, the latter is available mainly where the act of the administration is strictly judicial in character and absolutely illegal, the former will issue against any administrative act provided it comes under one of the recognised heads of equitable jurisdiction.

Injunction & prohibition contrasted.

27. The other equitable remedy, viz. a suit in equity against the Attorney General as representing the Crown for a declaration that the action threatened against the plaintiff by an administrative authority is contrary to law, will be obviously available where the courts will hesitate to issue an injunction in view of the rule just noticed that no injunction will lie which will involve an interference with the public duty of a department. Not much was heard of this remedy until it was re-discovered, if indeed it was not invented, by the Court of Appeal in *Dyson v. Attorney General* (b). The revival of this jurisdiction was the answer of the judges to the tendency shown in recent legislation to invest administrative boards and authorities with power to deal finally and conclusively with questions of fact or law or both materially

Declaratory suit against Attorney General.

May be available where injunction will be refused.

(a) Halsbury, *Laws of England*, Vol. XVII, p. 205.

(b) (1911) 1 K. B. 410 (1910).

The reason of  
its revival.

affecting the rights of individuals with or without the obligation to accord them a judicial hearing or indeed any hearing whatsoever (a). Farwell, L. J., said in that case (pp. 421-423), that although in a case where the estate of the Crown was directly affected the only course of proceeding was by petition of right (because the courts could not make a direct order against the Crown to convey its estate without the Crown's permission), yet where the interest of the Crown was only indirectly affected, the court of equity, whether it was the Court of Chancery or the Exchequer on its Equity Side, could and did make declarations and orders which did affect the rights of the Crown. For authority were cited the decisions in *Hodge v. Attorney General* (b) and *Deane v. Attorney General* (c). This view was reaffirmed by Farwell, L. J., in the Judicial Committee of the Privy Council in *Eastern Trust Co. v. McKenzie Mann & Co.* (d). Thus whilst the enactments of Parliament are aimed at enabling the administration to forestall the jurisdiction of courts of law by a quasi-judicial administrative determination, this procedure enables the individuals concerned to forestall the administrative authority by a *quia timet* bill in equity, which is not open to the same objection as a bill of injunction. This new (or revived) remedy, if fully availed of, will no doubt bring under the supervision of the courts many administrative acts and decisions which might otherwise escape it, but it does not alter the essential character of the administrative jurisdiction of the Higher Courts in England.

General character of these remedies : they do not touch the discretion of administrative authorities.

28. The outstanding feature of this jurisdiction is that whilst it is able to keep administrative authorities within the bounds of law, it leaves the discretion of these authorities severely alone unless there is a positive abuse of that discretion, so that merely erroneous exercises of discretionary authority by administrative officials and boards remain on the whole uncorrected by these extra-ordinary remedies. The only English courts which can revise the exercise of such discretion on fact

(a) See *Spackman v. The Plumstead District Board of Works*, 10 A. C. 229 (1885); *Board of Education v. Rice* (1911) A. C. 179; *Local Government Board v. Arlidge*, (1915) A. C. 120 (1914).

(b) 3 Y. and C. Ex 342 (1839).

(c) 1 Y. and C. Ex 197 (1835).

(d) (1915) A. C. 750 (1915).

as well as on law are the Courts of Quarter Sessions and this they do under statutory powers.

29. It must be remarked further that such jurisdiction as the Superior Courts possess of controlling the actions and decisions of the authorities under the writs and processes mentioned above is being steadily contracted owing to the tendency, in modern conditions inevitable, of charging special bodies of expert officials with the power as well as the duty of dealing expeditiously and finally with matters which no mere lawyer judge of an ordinary court of law can possibly dispose of to the satisfaction either of himself or of the parties interested, even were not the dilatory litigious procedure of the ordinary courts particularly unsuitable for the disposal of these cases. One can very well, in such circumstances, understand the alarm felt by judges (a) and legal writers (b) at the not very pleasing prospect of finding one's life and liberty placed at the absolute disposal of bodies of experts whose opinion, untested even as to legality by some trustworthy and disinterested tribunal, must be accepted as final. They are hardly to blame if in this tendency they discover a force inimical to the "rule of law," which they not without reason apprehend is going to be replaced by unchecked administrative paternalism (c).

Jurisdiction of Courts of Quarter Sessions to review facts. Steady contraction of this jurisdiction with the growing need of expert disposal of administrative matters.

Consequent danger to the "rule of law."

30. The tendency goes indeed deeper than English judges and legal writers seem to suspect. Administration is increasingly becoming, in some of its branches in particular, a matter of special experience and special knowledge, with which the general administrative machinery (with its familiar tripartite division of functions into legislative, executive and judicial), handed down from the 17th and the 18th centuries to the new era of industrial and sociological revolution, is finding itself less and less able to cope. Special organs of the administration are in their respective spheres being allowed to absorb not merely judicial but even legislative functions, making in fact their own ordinances, applying and executing them. "To turn

Modern tendency to invest administrative boards with legislative and judicial powers.

The necessary expression of profound economic and social changes.

(a) See *Dyson v. Attorney General* (1911) 1 K. B. 410 (1910).

(b) Dicey, "Development of Administrative Law in England," 31 L. Q. R. p. 150.

(c) Mr. Dicey writes in the article cited: "Such transfer of authority saps the foundation of that rule of law which has been for generations a leading feature of the English constitution."

a body of experts loose on the question", to quote a writer in a recent number of the *Harvard Law Review* (a), "seems often to be the only feasible method of attacking a new and highly complicated administrative problem. The very need of uniformity may demand that the question be handled as a whole by a single administrative bureau collecting information and evidence from all available quarters as only a Government bureau can, instead of leaving it to be threshed out in little pieces in the course of controversies between single individuals and officers of Government and before tribunals which, by their tradition and methods of procedure, cannot look beyond the interests of the litigants before them, and are moreover under no obligation to see that the several pieces hang together. To impose upon such authorities the technicalities of procedure familiar to law courts would be to destroy the very purpose of their creation.

31. This tendency manifests itself even more unmistakably in the American than in the English administration, a fact which is the more remarkable as the American courts have never been under an obligation to accept administrative arrangements as determined by the legislature at their absolute face value. The tendency needs a more detailed examination than has yet been given to it. But before I do that it would be desirable to review briefly the administrative jurisdiction of the American courts.

Administra-  
tive jurisdic-  
tion of courts  
in America.

32. A detailed analysis of the administrative jurisdiction of the superior courts in the United States is unnecessary, since it is derived from and not essentially dissimilar from that of the superior courts of England. Certain special features will be noticed in passing.

No inter-  
ference with  
discretion.

33. As in England, the courts in exercising this jurisdiction do not as a rule consider or review questions of fact and expediency. With the discretion of officials and public bodies the courts religiously refrain from interfering, irrespective of the rank or character of the officer or the body. But unless prevented by statute, the courts see to it that they act in conformity with the law. Be an officer never so humble, if he have discretion that discretion he exercises

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(a) A. A. Berle, Jr., "Expansion of American Administrative Law", 30 *Harvard Law Review*, p. 430 at pp. 441-442.

free from judicial control; be he never so influential he must act in accordance with the law (a). But for political reasons the courts have generally laid down the rule that they will not exercise their jurisdiction where it will bring them into actual conflict with the Chief Executive. The rule does not appear to have ever been departed from in the case of the President. The Supreme Court has refused to consider the question of issuing an injunction against the President to restrain him from enforcing a law alleged to be unconstitutional, *Mississippi v. Johnson* (b); and when a *habeas corpus* issued against a Federal officer was opposed by the orders of the President the court declined to take further action, *Ex parte Merryman* (c). Some of the State courts have endeavoured to extend this exemption from the operation of the jurisdiction of the courts to the heads of the departments. But this appears to be in conflict with the decisions of the United States Supreme Court (d).

But officials compellable to observe the law.

President and Governor of State may not be coerced.

34. It has to be remarked further that this extraordinary administrative jurisdiction is not possessed by all classes of superior courts in the United States as a consequence of the prevalent notion that the jurisdiction can be possessed only by those courts which have inherited the jurisdiction of the Court of King's Bench. Thus, though most of the common law courts are supposed to have inherited this jurisdiction, it is denied to mere appellate courts; and as in many jurisdictions there still exist separate equity and common law courts, equitable remedies in those jurisdiction can be

Administrative jurisdiction of State and Federal courts.

(a) Goodnow, *Principles of the Administrative Law of the United States*, p. 433. To this rule Mr. Goodnow notes three exceptions: (i) Questions of fact which have been decided by an administrative authority in deciding as to the title to office may be reviewed by the court either by *mandamus* or *quo warranto*; (ii) courts of some States will not permit administrative officers to make use of their discretion to make a decision which is absolutely unsupported by evidence, but will on *certiorari* quash such decision, (iii) the courts of some States hold that where a statute provides that an officer may be removed from office for cause only, they have the right to control the discretion of the removing officer in deciding what is cause. *Ibid*, pp. 433-434.

(b) 4 Wallace 475.

(c) Taney, 246.

(d) *People v. Supervisors of Queen's County*, 1 Hill N. Y. 195 (1841); *Speed v. Common Council*, 98 Mich. 360 (1891); *United States v. Schurz*, 102 U. S. 378 (1880).



given only by the former of those courts. The jurisdiction of the Federal courts however is not governed by these principles, but is fixed by the constitution and the statutes. Interpreting these provisions, it has been held that the United States courts generally have no power to issue the *mandamus* or *certiorari* except to aid an already acquired jurisdiction. To this rule the Supreme Court of the District of Columbia has been held to be an exception by reason of the fact that it has inherited, for the territory of that district, the jurisdiction of the Court of King's Bench. The rule appears to be the same as to prohibition, but are said to be more liberal with regard to the injunction, the *habeas corpus* and the *quo warranto*. The power to issue the *habeas corpus* to the administrative authorities of the States has been given by statute to all the United States courts except the Supreme Court. They have also the right to issue the *quo warranto* when the question at issue concerns the denial of the right to vote on account of race, colour or previous condition of servitude for any officer other than Presidential elector and legislative officers, or concerns the disqualification for other than legislative office resulting from the violation of the official oath, by engaging in insurrection or rebellion against the United States or giving aid and comfort to its enemies (a). The Supreme Court may not issue an injunction except to aid an acquired jurisdiction and except in cases where a State or a foreign diplomatic or consular officer is a party (b). The other United States courts have a larger power to apply equitable remedies in proper cases against the actions of the Federal and State officers. Congress has however forbidden the Courts of the United States to make use of the injunction to restrain the collection of taxes by the officers of the United States Government (c). These rules apply as well to the issue of these remedies against State officers as to their issue against the officers of the Federal Government. On the other hand, the courts of the States may not exercise

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(a) Cf. the XIVth Amendment to U. S. Constitution, sec. 3.

(b) Cf. U. S. Constitution, Art. III, sec. 2, Para. 2.

(c) Goodnow, Principles of the Administrative Law of the United States, p. 439.

this jurisdiction against officers of the Federal Government, since the United States Courts have exclusive jurisdiction of all cases arising under the constitution and laws of the United States. The result, says Mr. Goodnow, is that the officers of the Federal Government are not nearly so subject to the jurisdiction of the courts as are the State officers. "But," he adds, "this control is not nearly so necessary in this case, as the administrative control of the Federal Government is so strong that the mistakes of subordinate administrative officers are quite easily corrected on appeal to higher administrative officers."

Control over officers of State Governments greater than control over Federal officers.

35. The Courts of the United States, both Federal and State, have not been strangers, any more than those of England, to the process of statutory contraction and extension of their jurisdiction and powers. Thus the United States Circuit Courts can by the exercise of the statutory *certiorari* reverse or amend the decision even on facts of the Board of General Appraisers as to the classification of articles for duty under the Tariff Act (a). Less frequently than in England, appeals on both facts and law from the decisions of administrative officials have been given by statute to the Courts of Quarter Sessions or County Courts (b). Other statutory special courts of appeal are the various tax appeal courts or boards of review or relief, of which the most notable is the Boards of General Appraisers in the National customs administration which hears appeals from appraisals and classification decisions. But whilst administrative jurisdiction has thus in some ways been extended by statute, the opposite process, noticed in dealing with the administrative jurisdiction of the superior courts in England, of forestalling the courts by investing administrative officials and boards with judicial or *quasi-judicial* powers possessing varying degrees of finality (with which the courts, in view of the specialised knowledge demanded for their disposal, are showing themselves increasingly reluctant to interfere) has also been at work. In the article in the Harvard Law Review previously cited, the

Statutory extension of jurisdiction in America.

Contraction of jurisdiction, due to grant of quasi-judicial authority to administrative experts.

(a) U. S. Law of June 1890, c. 407, sec. 15.

(b) Goodnow, Principles of the Administrative Law of the United States, p. 441.

writer, Mr. Berle, quotes the following amongst other illustrations: When a shipper sought to bring a proceeding to test the reasonableness of rate in a Federal Court without a previous adjudication by the Interstate Commerce Commission, that court declined jurisdiction upon the ground that the Interstate Commerce Commission was set to solve such problems and that until such a solution had been obtained for review, no suit could be entertained (a). A workman cannot bring an action for compensation in Massachusettes without first going to the Industrial Accident Board. A court will not go into the question of patentability until the Patent Office has first said its say upon the claim (b). In the well-known case of *United States v. Ju Toy* (c), the Federal Supreme Court went so far as to hold that the decision of the emigration authority as to whether a person entering the country was a citizen or not, when the statute authorised the exclusion of aliens only, cannot be reviewed by the courts.

Courts supporting legislature in this transfer of jurisdiction to the administration though not bound to do so.

36. As previously explained the last word upon the soundness in policy of any administrative arrangement does not in America rest with the legislature but with the law courts (d). The illustrations cited above make it clear that the law courts in America are supporting the policy of the legislature of making over in increasing measures the final determination of questions arising between the administration and the people, in matters which seem to require special knowledge, despatch and uniformity of treatment, to the administration itself, without being (as are the courts in England) compelled to do so. This of course is in itself highly significant, but still more significant

(a) *Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 126 (1906) and other cases cited at p 415, 30 Harvard Law Review.

(b) *Standard Scale and Foundry Co. v. McDonald*, 127 Fed. 709, 710 (1904).

(c) 198 U. S. 253 (1905).

(d) In *New York v. Public Service Commission*, 38 Sup. C. Rep. 122 (1918), while upholding the determination of the Public Service Commission of New York arrived at at a hearing in which witnesses were cross-examined, testimony introduced and the case argued, the court, through Clarke, J., affirmed that it would enter upon such an examination of the record as might be necessary to determine whether a Federal constitutional right had been denied—whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the constitution.

is the change of attitude in this respect discoverable from a chronological study of the decisions of the courts themselves. Courts in America as in England were at one time distinctly jealous of what they seemed disposed to regard as the usurpation of judicial functions by administrative authorities, and a few decades ago they were ever ready to interfere on the ground that some jurisdictional condition had not been fulfilled by the administrative authority. *Warne v. Varley* (a) is still cited as a leading case in English and American text books (b). There searchers of leather had been appointed under statute, who were authorised to seize leather insufficiently dried in order to carry it before officers called triers. It was held that this authority did not extend to the seizure of any leather which was sufficiently dried though in their judgment it was not so, and that such a seizure being, on the owner's suit, found to have taken place, they were held liable in damages for trespass. The court, in other words, refused to assume that the searchers were vested with power to determine judicially the question whether the leather came within the statute or not, and any leather they seized in the *bona fide* belief that it fell within the statute they seized at their own risk. In *Miller v. Horton* (c), the majority of the Supreme Judicial Court of Massachusetts, through Holmes, J., allowed the owner of a horse which had been killed by the defendant Board of Health, after inquiry, in the *bona fide* belief that it had glanders, to prove in an action for damages that the horse was not suffering from the disease when it was killed and that therefore the killing was beyond the jurisdiction of the Board. There was no reason why the same interpretation should not have been applied to statutes which authorised immigration authorities to prevent the landing in America of undesirable aliens, and this indeed was the interpretation unanimously placed by the United States Supreme Court in *Gonzales v. Williams* (d) in 1904, for in that case Fuller, C. J., delivering the court's judgment observed that if Gonzales "was not an

Change in the attitude of the courts in this respect in both England and America.

*Warne v. Varley.*

*Miller v. Horton.*

The immigration cases.

(a) 6 T. R. 413 (1795).

(b) See Chaster, Public Officers, p. 37, and Freund, Cases on Administrative Law, p. 531.

(c) 152 Mass 540; 23 Am St. Rep. 850 (1891).

(d) 192 U.S. 1 (1904).

alien immigrant within the intent and meaning of the Act of Congress, the Commissioner had no power to detain or deport her," and that "she was not obliged to resort to the superintendent or the secretary," though the statute made all decisions by the inspecting officers or their assistants touching the right of any alien to land, when adverse to such right, final unless appeal was taken to the superintendent of immigration whose action in its turn was subject to review by the secretary to the treasury. But already in 1892, in *Nishimura Ekiu v. United States* (a), the Supreme Court, through Gray, J., (Brewer, J., dissenting), had refused relief to the complainant on the ground that she had not appealed to the superintendent of immigration and that therefore the decision preventing her from landing was final. To a similar effect was the decision of the Supreme Court delivered in 1904 through Holmes, J., (Brewer & Peckham, JJ., dissenting) in *United States v. Sing Tuck* (b) in which the majority were of opinion that "the attempt to disregard and override the provisions of the statutes and the rules of the department and to swamp the courts by a resort to them in the first instance must fail". Finally, in 1905, came the decision in *United States v. Ju Toy* (c) also delivered by Holmes, J., (Brewer, J., again dissenting), in which it was held that the question whether in fact the person desiring admission was a citizen or alien was itself for decision by the immigration authorities, and their decision (in the absence at least of proof of abuse of authority of any kind) was not reviewable by the court on an application for *habeas corpus*. The later decision in *Chin Yow v. United States* (d) delivered by Holmes, J., (with the concurrence of all the judges including Brewer, J.,) granting *habeas corpus* in a case where it appeared that the immigration authorities had not given the complainant a chance

*United States*  
*v. Ju Toy.*

(a) 142 U.S. 651 (1892).

(b) 194 U.S. 161 (1901). Though it does not make any difference in principle it should perhaps be stated that Gonzales was found even by the immigration authorities to have been a native of Porto Rico and was kept out not because she was an alien but because she was not a United States citizen. Fuller, C.J. laid stress on the fact that the immigration authorities had committed an error of law.

(c) 198 U.S. 253 (1905).

(d) 208 U.S. 8 (1908).

of establishing her citizenship does not take away from the effect of the decision in *United States v. Ju Toy* (a). Mr. Justice Holmes, jurist as well as judge, has evidently travelled a long way from the day in 1891 when he pronounced judgment as a judge of the Supreme Judicial Court of Massachusetts in *Miller v. Horton* (b). Mr. Berle, in the article in the *Harvard Law Review* (c) previously cited, expresses mild surprise that immigration officers should be assumed to have specialised and specific knowledge not available to the Supreme Court judges in the matter of determining whether persons entering the country from abroad could rightfully do so or not. But it is material to notice that in the debate in the English House of Lords on August 3, 1905, on the Aliens' Bill, Lord Coleridge's strong plea in favour of substituting in the place of the proposed Immigration Board a court of summary jurisdiction to review the decision of the inspecting officer declaring a person an undesirable alien not fit to be admitted into the country was rejected by a vote of 68 to 16 (d), the House having had the assurance of Government that at least one of the three members of the Board, and preferably its chairman, would be a magistrate, the other two to be selected from men of business and administrative experience.

Debate in the  
House of  
Lords on the  
Aliens' Bill.

37. It will be instructive now to consider the very similar change of attitude of the judges of the Superior Courts in England towards legislation which seems to invest administrative authorities with judicial or *quasi*-judicial powers, carrying with them varying degrees of finality not open to examination by courts of law. Three decisions of the House of Lords will suffice to indicate its drift. In the earliest of them, *Spackman v. The Plumstead District Board of Works* (e), Spackman was prosecuted for building beyond the "general line" of building alignment, as determined by the Superintending Architect of the Metropolitan Board of Works under power conferred on him by statute, the decision having been given

*Spackman v.  
Plumstead  
District  
Board of  
Works.*

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(a) 198 U. S. 253 (1905).

(b) 152 Mass. 450 (1891)

(c) "Expansion of American Administrative Law," 30 *Harvard Law Review*, 430 at p. 445.

(d) A sketch of the debate is quoted at p. 617 of Freund's *Cases on Administrative Law*.

(e) 10 A.C. 229 (1885).

upon reference to him by Spackman and the local authorities after the building had been constructed. The Magistrate declined to accept the Superintending Architect's line as the correct one and dismissed the prosecution. The statute did not prescribe any mode according to which the Superintending Architect was to arrive at his decision. "In the absence of special provision as to how the person who is to decide is to proceed", said Lord Selborne, "the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word, but must give parties an opportunity of being heard before him and stating their case and their views" (a). "He must give notice when he will proceed with the matter and must act honestly and impartially and not under the declaration of some other person or persons to whom authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute, if there were anything of that sort done contrary to the essence of justice. But it appears to me to be perfectly consistent with reason that the statute may have intentionally omitted to provide for form, because, this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him." To the suggestion that the decision, being that of a servant of the prosecuting local authority, was not likely to be unbiassed and a judicial review was necessary if only to correct that bias, his Lordship replied that the board was a "disinterested public body" (b) and that the Superintending Architect was a responsible "statutory officer." Lord Watson supplemented his colleague's reasons for upholding the finality of the Architect's decision by adding that such decision was likely to be less unfavourable to the interest of all parties concerned and less likely to defeat

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(a) Compare *Cooper v. Board of Works for Wandsworth District*, 14 C.B. (N.S.) 180 (1863).

(b) Lord Selborne had evidently never experienced at first hand the reality and force of the "official bias," one of the strongest known that can dominate the human mind. He should have lived either in Germany, or Russia or India to have felt the full force of it.

the ends of justice than a series of decisions by a number of different district magistrates. In *Board of Education v. Rice* (a), the House of Lords quashed the decision of the Education Board upon *certiorari* on the ground that the Board did not decide the questions which it was called upon to decide under the statute, and by *mandamus* ordered it to proceed according to law. But Lord Loreburn in the principal judgment in the case clearly indicated the limitations beyond which the courts must not pass in their interference with the finality of administrative decisions. "Comparatively recent statutes", his Lordship said, "have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination may be a matter to be settled by discretion involving no law but sometimes it will involve matters of law as well as matters of fact or even depend upon matters of law alone. In such cases, the Board of Education will have to ascertain the law and also to ascertain the facts. In doing either, they must act in good faith and fairly to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. The Board is in the nature of an arbitral tribunal, and a court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the court is satisfied either that the Board have not acted judicially in the way I have described or have not determined the question which they were required by the Act to determine then there is a remedy by *mandamus* and *certiorari*."

*Board of  
Education v.  
Rice.*

38. Finally, in *Local Government Board v. Arlidge* (b), the statute under consideration, as in *Spackman's case* just considered, did not prescribe any specialised system of procedure, but the Board was required to hold a public enquiry before arriving at its determination (i) as to whether a house should be condemned as unfit for human habitation, and also (ii) as to whether the repairs effected since the condemnation order had been such as to justify the revocation of that

*Local  
Government  
Board v.  
Arlidge.*

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(a) (1911) A.C. 179.

(b) (1915) A.C. 120.



order. The question in this case arose upon an application for revocation, and a Local Government Board's Inspector held the "public enquiry" in the locality and submitted his report, the contents whereof, according to the practice of the Board, were treated as confidential and were not disclosed to the applicant. The "Board" considered this report and without giving the applicant a further oral hearing before itself dismissed the application. The applicant Arlidge attacked this decision on several grounds, which, generally stated, amounted to a charge that the Board had not conformed to the principles of natural justice in arriving at its decision. *First*, he complained, he did not know who passed the final decision which was communicated to him over the signature of the President of the Board; *secondly*, that he never had a hearing before the officer who actually passed that decision; *thirdly* that that decision was passed behind his back upon the basis of a secret report, the allegations wherein he had no opportunity to refute, since they were in fact not disclosed to him.

Who is the disposing authority in a departmental board?

39. To the first of these objections, the reply of Lord Chancellor Haldane in effect was that the decision which bore the signature of the President of the Board had all the legal force of a decision of the President himself. The Lord Chancellor in the present instance had already had considerable experience as head of a department. The President of the Board, his Lordship went on to add, (unlike a judge) had other more onerous duties to perform in Parliament as well as outside it, besides attending to the administrative duties thrown on him by the statute, and, in the circumstances, he was not only at liberty but even obliged to rely on the assistance of his staff, and that therefore when the statute directed that an appeal was to be disposed of by the Board, all that was meant was that any particular official of the Board was to dispose of it (a).

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(a) I consider this apologia of Lord Haldane—which would make out that an order bearing the signature of the President of the Board (whoever may in fact have passed it) is equivalent to a determination of the controversy by the Board itself—as the strongest argument in favour of establishing administrative courts. The decisions of such courts are at least decisions of the courts themselves and not of some unknown person in the office who drafts the order and passes it on to the President for his signature. The best

40. As to the other objections, their Lordships were agreed that judicial methods of procedure should not apply to departmental action. It is sufficient that the case has been heard in a judicial spirit in accordance with the principles of substantial justice. But the report of the Inspector having been kept back from the complainant as a confidential document and the same not having been produced at the trial or before their Lordships, how, it is pertinent to enquire, were their Lordships able to assure themselves that the judicial "temper" and "spirit" and the "principles of substantial justice" were duly observed in this case? Lord Moulton was however unable to see why the report the Inspectors make to the department should be made public and was on the other hand fully persuaded that to permit such publication would be "mischievous"! Lord Moulton was more to the point when he said that the new procedure was intended to be an appeal to a superior executive body as such, in other words the appeal was intended to be a departmental and not a judicial appeal. Supposing, his Lordship asked, the legislature had given no appeal, "it might in that case be considered to have been unwisely drastic, but the decision of the local authority in that case would have to be recognised and enforced by the courts

Decision of administrative boards should be in accordance with not judicial procedure but "judicial spirit".

How the courts satisfy themselves as to this.

Practical surrender of administrative jurisdiction by the courts in favour of non-judicial departmental determination.

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commentary on this portion of Lord Haldane's judgment will be found in Mr. E. M. Sneyd-Kynnersley's "Some Passages in the Life of One of H. M.'s Inspectors of Schools." "I served the department or Board," he writes, "in one capacity or another and with some interval for more than 35 years (from 1872 to 1907). In all that time I never saw a Lord President of the Council, and I should often have found it hard to tell the name of the reigning potentate if I had been asked suddenly.....Our master at the Education Department of the Privy Council was master of all branches of that *rehmeyericht* .....I believe agriculture and public health were our rivals in his affections ... In actual practice he confined himself to the patronage." "My Lords were a Parliamentary fiction, in theory composed of the Lord President, the First Lord of the Treasury and some Secretary of State; in practice they had no existence, but I believe the Whitehall staff 'by long making believe' persuaded themselves that they were flesh and blood." The Minister in charge of the Education Department at the present day is, as was the President of the Local Government Board concerned in *Artidge's* case (Mr. John Burns), a live person. But accepting the description in Lord Haldane's judgment of the working of the department to be correct, is their not room for suspecting that there must still be plenty of "making believe" amongst the staffs of the most up-to-date departments of the English Government and this in spite of Mr. Kynnersley's assurance that the "Lord President" described by him is "now extinct as the mammoth" (pp. 112-114)

and no such question as to whether or not it was contrary to natural justice could possibly be considered by the courts. Cases of quarantine regulations, or the destruction of unwholesome food exposed for sale might under certain circumstances be left to the decision of executive officers without any appeal being given". Why then should the order in the present case be put in question when the Local Government Board appeared to have substantially conformed to the requirements of the statute by holding a "public inquiry", though only before an Inspector who apparently was not authorised to, and did not, decide the matter in controversy himself?

41. It has been humorously suggested that the Feudal system was really introduced into England by a seventeenth century scholar, Sir Henry Spelman, whose researches undoubtedly resulted in the first systematised account of that historic institution. Messrs Jenks and Pollard have in a somewhat similar sense put forward the claim, as inventor of the Magna Carta, of Chief Justice Coke, in whose expositions of that charter, what in origin was a tale of feudal privileges assumed the dignity and status of a charter of all people's rights. Mr. A. V. Dicey may in the same sense be credited with having introduced into the world of political and administrative science the English "rule of law." Mr. Dicey, commenting on the decision in *Local Government Board v. Arlidge* (a), in a passage which I have already quoted (b), has observed that the transfer by legislation of judicial functions from the courts to administrative boards "saps the foundation" of that rule of law. The decision itself, he is constrained to admit, is "a considerable step towards administrative law in the French sense."

Mr. Dicey's  
apprehensions  
of the advent  
in England  
of French  
"Droit ad-  
ministratif"  
examined.

42. "Administrative law in the French sense," Mr. Dicey (in common with most English constitutional writers), views with unconcealed jealousy and suspicion. Whether that jealousy is due to the traditions of oppression left to history by the defunct Court of Star Chamber, or whether that suspicion is engendered by that association with bureaucracy in which administrative courts on the Continent of Europe have been invariably found, I need not pause to enquire. Suffice it to say

(a) (1915) A. C. 120.

(b) *Supra*, p. 617, note (c).

that after pointing to the advance made by the decision in *Arlidge's case* towards "administrative law in the French sense," Mr. Dicey proceeds to congratulate himself that the advance has not been far enough yet, since "ordinary courts of law can still deal with any actual or proveable breaches of the rule of law, which is fatal to the existence of true *droit administratif*," and he consoles himself with the hope that "it is probable that in some form or other the English courts will always find means for correcting the injustice, if demonstrated, of any exercise by a Government department of judicial or quasi-judicial authority." The only means up till now discovered, that I can find, is the revival (or creation) of the jurisdiction already considered to entertain *quia timet* bills of declaration against the Attorney-General as representing the Crown in respect of threatened action by departments of Government in pursuance of statutory authority, a jurisdiction which, as I have already explained, is not likely to carry matters very far. To any one who has followed the discussion thus far, it must be quite clear that the new danger to the "rule of law" arising from the setting up of self-contained administrative boards or other institutions exercising within their respective spheres more or less uncontrolled legislative, judicial and executive functions, cannot be met by any fresh development of the administrative jurisdiction of the Superior Courts, which itself is being inevitably contracted in proportion as those of the administrative bodies mentioned above are, from the very necessities of modern social and political life, as inevitably extending. Mr. Elihu Root, lawyer, administrator and politician, (I am convinced) read the signs of the times unerringly when he said:—

43. "There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which Government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment

Mr. Elihu Root upon the need for developing a new form of judicial control over administrative discretion.

of that method. The Interstate Commerce Commission, the State Public Service Commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the Health Departments of the States, and many other supervisory offices and agencies are familiar illustrations. Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a Government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect." (a)

Establishment of administrative courts in Anglo-Saxon countries will be an improvement upon the existing arrangement.

44. The time, I am convinced, has definitely arrived for the creation, in England and America and in fact in every part of the world where the English system of public law prevails, of an administrative jurisdiction of the kind which obtains in several countries on the Continent of Europe. The adoption of such a course will not be after all a new creation but a revival of a jurisdiction which fell with the English Court of Star Chamber. The judicial control of the administration is in fact giving place to unregulated and secret administrative control. The problem is to convert this latter again into a form of judicial control, more specialised, quicker and less technical, yet open, formal and, where necessary, contentious. The French nation has already evolved a highly efficient system of administrative courts in the course of the last hundred years. I see no

(a) Elihu Root, *Addresses on Government and Citizenship*, pp. 534-535.

insuperable difficulty in the way of developing similar institutions in England and America, and I do not share the jealousy and suspicion entertained by the older generation of English lawyers against French administrative law and jurisdiction. That law has no doubt, as I shall proceed to show, grown within the bosom of bureaucracy. But in so doing it has regulated and humanised bureaucracy. If under modern conditions, growth of officialism be inevitable even in England and America, there should grow along with it its natural antidotes, administrative law and administrative courts.

The only  
antidote to  
growing  
officialism.

45. Before I take up, as I should now do, the consideration of the administrative tribunals of the Continent of Europe, it will be necessary to sketch in outline what administrative jurisdiction there is in British India. There is, I may at once state, not much to say about it. Cl. 4 of the Charter of the Supreme Court of Calcutta, dated the 26th March 1774, provided that the Chief Justice and the Puisne Judges of the recently established Supreme Court were appointed severally and respectively Justices and Conservators of the Peace and Coroners within and throughout the Provinces, Districts and Countries of Bengal, Behar and Orissa, and every part thereof, and to have such jurisdiction and authority as His Majesty's Justices of the Court of King's Bench had or might lawfully exercise within England by the common law thereof. By cl. 21 of the Charter, the Supreme Court was specifically empowered to issue writs of *mandamus*, *certiorari*, *precedendo* and error to certain inferior courts and magistrates mentioned in the clause. Sec. 9 of the High Courts Act (24 and 25 Vict. c. 104) of 1861 continued the jurisdiction of the Supreme Court which was abolished by the Act in the Original Side of the present High Court of Calcutta, the jurisdictions of the Sudder Dewani and Sudder Nizamat Adalats in appeals from Mofussil courts (which too were abolished by the Act) being similarly continued and preserved in what is now known as the Appellate Side of the High Court (a). If the language only of cl. 4 of the Charter of 1774 had to be looked into, to determine the extent of the administrative jurisdiction of the Calcutta High Court, there would perhaps be no dispute that

Administra-  
tive jurisdic-  
tion in British  
India.

Of the Ori-  
ginal Side of  
the Calcutta  
High Court.

(a) See sec. 106 of the Government of India (consolidation) Act of 1915, as to the jurisdiction of the Original Side of the Chartered High Courts.

that court on its Original Side could under the terms of that clause, at this moment, issue over the whole area mentioned above and with reference to all the inhabitants thereof writs of *habeas corpus*, *quo warranto*, *certiorari*, prohibition or *mandamus* in the same manner and to the same extent as the Superior Courts of England; and being besides a Court of Equity could issue injunctions and other equitable processes, subject of course in either case to statutory extensions and limitations specially applicable to those districts and provinces. But it has to be remembered that at the date of the Charter, the territorial jurisdiction of the Supreme Courts did not extend beyond the Presidency town of Calcutta and its jurisdiction outside was personal and exerciseable in reference mainly to such persons as were "British subjects" as the expression was understood to mean at that time (a). This section has accordingly been generally assumed, ordinarily, to authorise the issue of writs of *habeas corpus* within what is now known as the limits of the Original Side of the High Court, though the High Court has for that reason found no difficulty in issuing writs of *habeas corpus* for the release of persons arrested within those limits but carried away and detained outside. And this limited interpretation is the one which has been accepted by the Indian legislature, as appears from sec. 491 of the Criminal Procedure Code (Act V of 1898) and sec. 45 of the Specific Relief Act (I. of 1877). The former expressly provides that "directions in the nature of a *habeas corpus* may in proper cases be issued by the High Courts of Calcutta, Madras and Bombay to bring persons illegally or improperly detained in public or private custody within the limits of the Original Civil Jurisdiction of these courts." The latter recognises the authority of the said High Courts to make orders in the nature of a *mandamus*, requiring specific acts to be done or forborne within the local limits of the Original Civil Jurisdiction of such High Courts by any person holding a public office or by any corporation or inferior court of justice. The other prerogative writs have not been expressly mentioned in any Indian enactment but a writ of *certiorari* appears to have been issued without question in *Nundo Lal Bose v. The Corporation of the Town of Calcutta* (b) to

Its limits—  
Jurisdiction  
exerciseable  
by the Original  
Sides  
of the Calcutta,  
Bombay and  
Madras  
High Courts  
within local  
limits of  
Presidency  
towns only.

*Habeas  
Corpus.*

*Mandamus.*

*Certiorari.*

(a) See *supra*, Lecture V, para. 43, note.

(b) I. L. R. 11 Cal. 274 (1885).

bring up and quash an assessment of rates alleged and found to be without jurisdiction. In *In Re Besant* (a), Rahim C. J. mentions the fact that writs of *certiorari* have been issued by the Bombay High Court also (p. 1176), and his Lordship and his two colleagues, differing in other respects, were agreed that the Madras High Court, having inherited the jurisdiction conferred on the Supreme Court by 39 and 40 Geo. III, c. 79, and by the Letters Patent of 1800, have authority, subject to restrictions imposed by statute, to issue writs of *certiorari* to remove and quash matters judicially determined by administrative officials. It naturally follows that writs of prohibition and *quo warranto* may be issued by the said High Courts of Bombay, Madras and Calcutta, subject to the same local limitations. Having regard to what I have already stated, I find it difficult to affirm that the Patna High Court has inherited any of these jurisdictions and I have scarcely any doubt that the Allahabad High Court and the various Chief and Judicial Commissioners' courts have no jurisdiction to issue these prerogative writs. But all courts in India are courts of equity in so far as they may grant the several reliefs other than *mandamus* dealt with in the Specific Relief Act, in conditions and circumstances specified in that Act, and thus an injunction may in a proper case issue from any court in British India to restrain an official from wrongfully exercising his powers, provided it does not interfere with the public duties of any department of the Government of India or a Local Government. Nor will an injunction be granted to restrain a person from applying to any legislative body, or to stay proceedings in any criminal matter (b). Sec 42 of the Act authorises all courts in India to entertain and in the exercise of sound discretion decree suits for declaration only by any person entitled to a legal character or any right to property against any person denying or interested to deny his title to such character or right. But the section, wide as it is, is hardly comprehensive enough to cover a *quia timet* bill for declaration against Government in respect of a threatened legal injury in pursuance of powers conferred on its officials by statute. The prerogative writs can, of course, issue from the High

Prohibition  
and *quo*  
*warranto*.

Patna and  
Allahabad  
High Courts  
cannot issue  
prerogative  
writs, nor  
Chief Courts  
and Judicial  
Commissioners'  
courts.

Equity juris-  
diction of all  
Indian courts  
under the  
Specific Re-  
lief Act.

Injunctions—  
Limits to  
their issue  
against the  
administra-  
tion.

*Quia timet*  
declaratory  
action against  
officials if  
lies.

(a) I. L. R., 39 Mad. 1164 (1966).

(b) Specific Relief Act (I of 1887), sec. 53, cls. (c), (d) and (e).



*Mandamus* may not issue against certain authorities,

Sec. 111 of the Government of India Act of 1915.

Courts of Bombay, Madras and Calcutta (as already stated), subject only to the conditions and restrictions which qualify the issue of those writs in England. It may however be as well to note here that sec 45 of the Specific Relief Act expressly provides that no writ in the nature of a *mandamus* will be issued to make any order binding on the Secretary of State for India in Council or the Governor General in Council, or the Governors of Bombay and Madras in Council or the Lieutenant Governor of Bengal. Other restrictions are implied in the provision now embodied in sec 111 of the Government of India Act to the effect that the order in writing of the Governor General in Council for any act shall, in any proceeding civil or criminal in any High Court acting in the exercise of its Original Jurisdiction, be a full justification of the act except so far as the order extends to any European British subject. The existence of this provision was considered by Norman, J., sufficient by itself to deter a court from issuing a writ of *habeas corpus* in case of detention under Act III of 1858, such detention being under a warrant in writing of the Governor General (a).

Jurisdiction extremely narrow.

Statutory contraction thereof.

The Press Act I of 1910 examined.

46. From the forgoing considerations it seems clear that the administrative jurisdiction of the Superior Courts in India, where it exists, not taking into account limitations imposed thereon by statute, is confined within very narrow bounds, both as to area and as to subject matter. As to statutory restrictions, a single instance will suffice to show the extent to which they may be carried. The Press Act I of 1910 which was enacted "to provide better control of the Press" (preamble) requires deposits (secs. 3, 5, 8 & 10) of security of from Rs. 500 to Rs. 1,000 at a time, at the discretion of a District or a Chief Presidency Magistrate by keepers

High Court's power of superintendence under Government of India Act sec. 107.

(a) *In re: Ameer Khan*, 6 Beng. L.R. 392 (1870). I exclude from this consideration of the administrative jurisdiction of the Superior Courts in India the powers conferred by sec. 107 of the Government of India Act of 1915 (formerly sec. 15 of the High Courts Act of 1861), since under those sections (as under the revisional sections of the Civil and Criminal Procedure Codes), the High Courts are authorised to superintend and direct inferior courts of law only and not administrative officials. I am not sure that the claim put forward by a Full Bench of the Calcutta High Court in *Emperor v. Har Prasad*, I.L.R. 40 Cal. 477 (1913), to exercise general revisional jurisdiction over revenue courts is altogether valid (p. 491).

of printing presses and publishers of newspapers, which deposits the Local Government is authorised to declare forfeited (together with copies of the offending newspaper, book or other document) whenever it should appear to the Local Government that any publication issued out of the press or appearing in the newspaper contains "any words, signs or visible representations which are likely or may have a tendency directly or indirectly, whether by inference, suggestion, allusion, metaphor, implication or otherwise, to produce certain effects (secs. 4, 6, 9, 11 & 12) specified in sec. 4. These are too long for reproduction here, but it will suffice for my present purpose to state that in the judgment of Jenkins, C. J. of the Calcutta High Court, as expressed in *In re Mahomed Ali* (a), if any Local Government chose to treat any particular writing as falling within that section, the language of that section was so wide that it would ordinarily prove a hopeless task for any person affected by an order of forfeiture to establish that the writing did not contain words which fell within the comprehensive provision of the Act. Sec. 17 of the Act however permits any person having an interest in any property in respect of which an order of forfeiture has been made, within two months from the date of such order, to apply to the High Court to set aside such order on the ground that the newspaper, book or other document in respect of which the order was made did not contain any words, signs or visible representation of the nature described in sec. 4 (see also sec. 18), and sec. 22 then proceeds to state that "every declaration of forfeiture purporting to be made under the Act shall, as against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under the Act shall be called in question by any court except the High Court on such application as aforesaid, and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be

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(a) I.L.R. 41 Cal. 466. at p. 491 (1913). Stephen, J. in the same case said : "So wide indeed are the powers that the legislature has conferred on the Government that they would be able to confiscate a newspaper containing words that might cause one man to hate or even to condemn a class, if such there should unhappily be, who sought to embarrass the Government of the country by murder and robbery."

Judicial interpretations of the Act.

done under this Act". Then as to the way the Act has been interpreted by the High Courts in so far as it bears upon the jurisdiction of those courts to review orders passed under the Act, in the case just mentioned the Calcutta High Court was of opinion that although in that case the Local Government had failed to comply with the mandatory direction of sec. 4 of the Act to state in its order of forfeiture the grounds thereof and that therefore the order of forfeiture itself was illegal, sec. 22 of the Act made it impossible for the High Court to set aside the order on that or any ground other than the one specified in secs. 17 and 19, viz., that the publication was not of the nature described in sec. 4. The court however (or at any rate the majority thereof) found itself equally helpless in proceeding to review the decision of the Local Government directing a forfeiture on the one ground permitted to it by secs. 17 and 19, for it held that in arriving at that decision the Government might well have relied on knowledge and information specially in its possession which it might not have been in a position to disclose in a court of law, and that if with all the information at its disposal it was the Government's view that a publication was of the character described in sec. 4, "the court, no more informed than the man in the street, cannot affirm that this could not be so, and affirm it with a degree of assurance that would entitle it to set aside a measure of safety on which the Governor had solemnly resolved." "The fact is," Jenkins, C.J., added, "that the executive and judicial authorities stand on wholly different planes for the purpose of arriving at a decision as to the propriety of executive action, and the one cannot sit in judgment on the determinations of the other."

Hesitation to interfere with decisions of the Government on matters specially within its knowledge, though expressly authorised by law.

General agreement of the Courts in England, America and India in this matter.

47. It is needless to emphasise how faithfully the views of the Calcutta High Court in this case echo those of the judges of England and America in certain recent judgments which have been already discussed. The views of the Calcutta High Court as expressed in this case are the more remarkable as they were pronounced in a matter in which the legislature permitted a direct challenge of the accuracy of an administrative decision by an appeal to the law court. Upon the plain provisions of secs. 17 and 19, it is impossible not to agree with Stephen, J., in *In re : Mahomed Ali* (a) that the

appeal to the High Court lay, on fact as well as law, on the question as to whether the publication objected to fell within the description of sec. 4 or not.

48. It seems to have been possible in the case just noticed for the applicant before the High Court to have asked that court to hold that the order of forfeiture was made without jurisdiction on the ground of its non-compliance with the mandatory provision of sec. 4 directing the Local Government to state the grounds upon which in its judgment the publication merited forfeiture, and to have on that ground invoked its common law jurisdiction to quash the order by *certiorari*, for it is a well-known rule of unquestionable authority in both England and America that a section in an Act of Parliament taking away *certiorari* did not apply where there was an absence of jurisdiction (a). The point was squarely raised in *In re : Mrs. Annie Besant* (b). In this case the Chief Presidency Magistrate having by a previous order dispensed with security in respect of a press, passed another superseding that order and demanding security from the keeper. This latter order was challenged before the High Court as made without jurisdiction upon an application for a writ of *certiorari* and this contention was upheld by the majority of the court (Rahim, C. J., and Seshagiri Ayyar, J., Ayling J. dissenting). The majority however were of opinion that the order in question was not a "judicial" but an "executive" act not open to review by *certiorari*. Had they considered the order to be a judicial order the majority would probably have felt themselves competent to quash the order, the provisions of sec. 22 of the Act notwithstanding. But Ayling, J., had no doubt that even assuming that the order was *ultra vires*, as that order was made in a proceeding which "purported" to be taken under the Act, within the language of sec. 22, the jurisdiction to quash by *certiorari* was taken away by the express language of the statute even in respect of acts which were *ultra vires*, and personally I have no doubt that such was the intention of the legislature, and that the High Court had no jurisdiction to quash the order unless the Press Act itself was declared to have been *ultra vires* of the Indian legislature.

Refusal of Indian courts to quash orders on the ground of want of jurisdiction.

Power by *certiorari* to quash for want of jurisdiction taken away by statute.

(a) See *Ex parte Bradlaugh* L.R. 3 Q.B.D. 509 (1879) amongst other cases.

(b) I.L.R. 39 Mad. 1164 (1916).

49. It appears, indeed, to have been argued in this case that the Act itself was in contravention of the limitation imposed upon the Indian legislature by sec. 65 (2) of the Government of India Act of 1915 which prohibits the passing by that legislature of any law affecting any part of the unwritten law or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom. This contention was not accepted by Seshagiri Ayyar, J., and was not touched upon by Ayling, J.; and Rahim, C. J. refused to deal with it finally upon an application under sec. 17 and 19 of the Press Act on the ground apparently that the court's jurisdiction upon such an application was absolutely restricted by the terms of those sections. It is however not necessary for my present purpose to refer in further detail to the opinions of the individual judges who composed the benches of the High Courts of Calcutta and Madras which dealt with the three cases under the Press Act mentioned above. They show plainly enough that the judges of the High Courts of Madras and Calcutta were even less inclined to assume jurisdiction than the legislature was to give it.

Explanation  
of the non-  
extension of  
the adminis-  
trative juris-  
diction of  
the High  
Court outside  
Presidency  
towns.

50. So much for the control exerciseable by the Superior Courts over the administration in India. I have already stated that over the greater part of India this jurisdiction, such as it is, does not apply. Whatever may be the historical explanation of the absence of an administrative jurisdiction outside the three Presidency towns, it is difficult to find any justification in principle for differentiating between the two areas at the present day. The extension of this jurisdiction outside the three Presidency towns has evidently been arrested owing to the small favour with which this jurisdiction is viewed by the ruling body in India. It is sincerely to be hoped that the uniformity of law and jurisdiction which one would like to see established within and outside the Presidency towns will be attained not by abolishing this jurisdiction where it exists, but by extending it to where it does not. That it has some value in the eyes of the people hardly admits of any doubt; and it is pathetic to watch the strenuous but fruitless endeavours made by litigants and their legal advisors in India to invoke this jurisdiction in cases

Its value in  
people's  
eyes.

where the legislature, in whose gift it is, has unequivocally withheld it from them (a).

51. It follows therefore that whilst administrative officials in India are habitually clothed with much larger powers of interference with private rights, those whose rights are invaded have not, except within very circumscribed local and others limits, the right to invoke even the administrative jurisdiction of the superior courts to compel public authorities and officials in India to observe the law and to keep them within the limits of their jurisdiction in the performance of their official duties.

52. If the English are to be regarded as the originators of the rule of law, to the French nation belongs the credit of evolving the machinery which alone is capable in modern conditions of fulfilling it, the institution, namely, of administrative courts. It would be wrong to say that the Anglo-American system of administration is altogether a stranger to this institution. The Courts of Quarter Sessions, composed of the justices of the peace of the county hear appeals from the administrative decisions of individual justices on fact as well as on law; and the *personnel* of these courts being thus made up of the very persons who are actively engaged in the work of the administration, Mr. Frank Goodnow finds in these courts (b) all the marks of a true administrative court, and he deplores the very moderate use made of it up to date in the United States. But it should be remembered that the Court of Quarter Sessions, and in fact all administrative officers and bodies exercising judicial and *quasi*-judicial functions, are under English constitutional theory affiliated, for the purpose at least of the exercise of their extraordinary administrative jurisdiction, to the Superior Courts, in so far as such jurisdiction has not been taken away expressly or in the net result by statute; and this, in the view of Mr. Dicey at any rate, must be taken to be fatal to the claim of such bodies to be regarded as true dispensers of the "*droit administratif*." An administrative court has been defined by Mr. Goodnow (c) as a tribunal

Administra-  
tive courts,

(a) For the latest instance, see *Pormeshtwar Akir v. The Crown*, (1918) Pat. 97.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, p. 196.

(c) *Cyclopedia of American Government*, Title, "Courts and Tribunals, Administrative".

Their historic connection with bureaucracy.

discharging judicial functions whose jurisdiction is confined to controversies arising between the authorities and officers of the Government and between such officers and authorities on the one hand and individuals on the other. Such tribunals originated in France and have been extensively copied in other countries including Japan. They are generally viewed with suspicion by English publicists as being the natural organs of a bureaucracy, and they undoubtedly commenced their career under official auspices. It may even be conceded that their adaptability to modern conditions and the uses to which they may be put to fulfil the rule of law never crossed the imagination of their first founders, and are imperfectly realised even to-day. Moreover, although the institution has developed enormously in its original home during the last century in its functions and usefulness, it has, neither there nor in other countries where it has been transplanted, attained anything like the perfection implied in the definition given above.

Its origin in France in mere administrative and departmental appeals.

53. I need hardly repeat what I have said before that the institution originated in France during the Napoleonic regime in the form of purely administrative appeals from lower to higher administrative authorities in the highly centralised bureaucratic administration established by the First Consul. This stage may very well be compared with that which at this moment is developing in Anglo-Saxon countries by the process previously outlined of progressive transfer of power finally to determine disputes between public authorities and private citizens from courts of law to higher administrative authorities. The dominating motive which underlay the system was to free the administration from all interference by the judiciary but it was of course impossible for the administration, thus freed from judicial control, long to remain a system of administrative opportunism without placing itself in a position of uncompromising hostility towards the demands of equality and justice the mainsprings of the era of the French Revolution. In the result, the administration itself in dealing with appeals from the orders and decisions of its officials and public corporations developed *quasi-judicial* forms and principles. The advance made in this direction in the latter part of the 19th century had indeed been so marked that the First International Congress on Administrative Sciences which met at Brussels in

Gradual transformation of administrative into judicial control in France.

The work of the Council of state in this direction.

1910 was able to bear concordant testimony to the fact that in France alone of all countries, mainly though the beneficent activities of her highest administrative court, the Council of State, administrative law had attained the character of positive law, whilst in other countries it had scarcely yet passed beyond the stage of self-regulated administrative discretion (a). In other countries, it is still extremely difficult to distinguish the working of an administrative court from that of a superior administrative authority hearing administrative appeals from an inferior authority. An ideal administrative court (and it is that towards which all administrative courts are tending in France as in other countries) would be one whose members may not be summarily removed by the executive and whose orders and judgments would be capable of immediate execution without being subject to review by any but a judicial authority of the same character (b). The first-mentioned condition has scarcely yet been fulfilled in the organisation of the administrative tribunals of France, for members of the Council of State which is the supreme administrative court and of the Councils of Prefecture (which are administrative courts of lower instance in the localities) are appointed by and are summarily removable by the President. On this point the Prussian administrative courts approach the ideal more nearly than the French, for in Prussia the members of the highest administrative court are altogether independent of the administration and the members of the lower administrative courts also enjoy an irremovable tenure due to the fact that no officer can under Prussian law be dismissed or transferred without cause.

An ideal administrative court.

Conditions thereof not completely fulfilled even in France, e.g. as to independence of tenure of judges.

Independence of tenure in Prussia.

54. Whilst on this subject of the *personnel* of the administrative courts on the Continent of Europe, it is desirable to note that one of the main justifications of the maintenance of administrative courts separate from and independent of the ordinary judiciary is that many matters of administration demand for their decision expert inside knowledge of administrative needs which can come only from active participation in the work of the administration and which is impossible

The requirement that members of administrative courts should be men actively engaged in administration, its value.

(a) G. Montague Harris, *Problems of Local Government*, p. 142.

(b) Goodnow, Article on "Courts and Tribunals, Administrative" in the *Cyclopedia of American Government*.



sible to expect from mere lawyer judges who alone preside over the ordinary courts. This view is consistently worked out in the composition of the administrative courts of France. But in Prussia the judges of the highest administrative court are not recruited from the active members of the services, though in the lower instances the judges consist entirely of men engaged in the active work of the administration. There is this further difference in the composition of Prussian and French administrative courts of lower instances that in the former the membership is predominantly lay whereas in the latter it is wholly professional. It is, it should be remarked, this requirement of the administrative courts being recruited from administrative experts that contains within it the possibility, referred to above, of this kind of court proving to be, in the near future, just that institution which, under modern conditions (demanding as they do increased specialisation in administration as in other matters), is likely to secure the efficient performance of the functions of the administration without interference with the rights of the public.

Administrative courts naturally courts of enumerated powers.

Jurisdiction of French administrative courts—its extent.

55. One other general characteristic of administrative courts traceable to their origin should be mentioned. Being jurisdictions of recent origin, these courts are as a rule courts of enumerated powers. But the grant of jurisdiction to the French administrative courts is generally expressed as being in respect of all conflicts between the administration and individuals and the interpretation of all administrative acts (a). This jurisdiction has on the one hand been contracted by statutes handing over specified matters for disposal by the ordinary courts. Thus the entire control of the matter of expropriation or the exercise of the right of eminent domain has in this way been transferred to ordinary courts, and, in consequence of the provisions of the Penal Code, arrests made by the administration are under the control of ordinary courts. On the other hand, special laws have conferred upon administrative courts jurisdiction in respect of all cases of Government liability whether based upon contracts or torts. Also, though the general police jurisdiction is by law within the jurisdiction of the ordinary courts, a certain amount of police jurisdiction has been transferred to the administrative courts.

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 221.

The net result, according to Goodnow, is that the administrative courts of France are courts of enumerated jurisdiction, but the particular grants of jurisdiction are so numerous that, though in theory courts of enumerated jurisdiction, the important administrative courts are practically courts of general jurisdiction (a).

56. As to the nature of the control exercised by French administrative courts, over the administration, it will be remembered that "acts of government" or political acts of the administration are outside their jurisdiction. Also, as pointed out in a previous lecture, "personal acts" of officials are subject to the jurisdiction of the ordinary courts (b). It is only what go by the name of "acts of administration" that come within their jurisdiction. Differences of opinion, it is obvious, will always arise in marking off the limits of "acts of administration" so as to separate them on the one hand from "acts of government" and from "personal acts" of individual officials on the other. It is this difficulty which has called into existence the sister institution of the Court of Conflict (c).

No jurisdiction over "acts of government" & "personal acts" of officials.

Function of courts of conflict.

57. Within limits thus circumscribed, the general jurisdiction of administrative courts extends only to special and individual acts of the administration and not to acts of general application, e. g. ordinances, and can be invoked only by some person whose right (and not interest only) has been violated—by a person, in other words, who in English legal parlance has suffered particular damage.

General jurisdiction of administrative courts covers special acts affecting individual right and not ordinances.

58. But besides this general jurisdiction, the Council of State possesses a special jurisdiction as Court of Cassation to annul all acts of the administration, whether special or general,

Special jurisdiction of Council of State to annul both general and special orders for excess of powers.

(a) Goodnow, *Comparative Administrative Law*, Vol II, pp. 222-223

(b) See *supra*, Lecture XIII, para 21.

(c) See *supra*, Lecture XVII, paras. 3-6. *Comparative Administrative Law*, Vol. II, pp. 257-261. The existence of these conflicts is regarded by Goodnow as one of the greatest disadvantages of the system of administrative courts. "For," says this author, "in the case of a positive conflict, the decision of a private law case may be greatly delayed, while in the case of a negative conflict, an individual may be obliged to apply to both classes of courts and to the conflict court, before he knows which court is the proper one". Much of this trouble, however, is avoided in the administrative system of the German Empire, where the superior judicial court has the final power of decision. *Ibid*, p. 261.

for excess of powers. This jurisdiction can be exercised at the instance as well of persons whose interests are in jeopardy as of those whose rights have been violated. The decisions of the Council of State hold that there is an excess of power (1) when an administrative authority encroaches upon the competence of some other authority, whether that authority be the legislative, a judicial or another administrative authority, (2) when the administrative authority does not follow the formalities laid down in the law as necessary, and (3) when an administrative authority, even when acting within its competence and following the necessary formalities, uses its discretionary power for purposes other than those for which the power was granted. This last principle of questioning administrative acts on the ground of a colorable use of legal powers, known by the name of "*détournement du pouvoir*" figures prominently in the literature of French administrative law (a).

Review on fact as well as on law under the general jurisdiction.

59. Under the general jurisdiction mentioned above, which is known by the name of *contentieux administratif*, administrative courts in France review the decisions of administrative authorities on questions of fact and expediency as well as jurisdiction and law, and it is by reason of this wide power of review that the French administrative jurisdiction is able to afford larger protection to subjects against interference by the administration, than the superior courts in Anglo-Saxon systems in the exercise of their administrative jurisdiction. These appeals on facts are not determined within the secret precincts of a central office, by no one knows what official, upon confidential reports submitted by an inspector who is supposed to have satisfied the requirement of law that there should be a public inquiry by one held before himself and not before the deciding official (b). The administrative courts are real courts presided over by judges and acting according to forms of law, though not identical with those of ordinary courts.

Nature of the special jurisdiction of the Council of State, compared with the jurisdiction of English courts by *certiorari* and injunction.

60. The special jurisdiction of the Council of State mentioned above does, however, to a large extent resemble that exercised by the Superior Courts in England by *certiorari* and

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 230. Lowell, *Government of England*, Vol. II p. 499.

(b) The allusion here of course is to the procedure upheld in *Local Government Board v. Arlidge*, (1915) A. C. 120. See *supra*, paras. 38 et. seq.

injunction. The Council of State may ordinarily simply annul the act complained of and may not amend it or substitute another decision for the one appealed from and will necessarily consider questions of law almost alone. But the free use made of the principle of *detournement du pouvoir* in practice enables it to set aside many instances of abuse of authority which could not be corrected by *certiorari* in England (a). Moreover, when an administrative act has been annulled by the Council of State, it is open to the party affected to bring an ordinary action for damages against the State or the administrative body or official for loss sustained by reason of the act annulled by the Council of State (b).

61. Having grown, as stated above, out of the practice established during the First Empire of allowing appeals freely from lower to higher authorities, the administrative jurisdiction in France retains a feature which characterised the parent institution, viz. unlimited facility of appealing from lower to higher instances. The right of appeal is not limited by the amount at stake. To the parent institution too, it owes its simpler procedure, and though contention is not excluded, the judges are not confined in their consideration of the case to what is laid before them, but may like equity courts in England take such measures as they see fit to get at the truth (c).

62. As to the organisation of French administrative courts, there are, besides special administrative courts having jurisdiction over special matters (such as the Educational Courts and the Councils of Revision, which latter being composed of civil and military officers decide all complaints arising out of the application of the conscription laws), there are the Councils of Prefecture which are general administrative courts. Both kinds of courts are affiliated to the Council of State which may review the decisions of general administrative courts of lower instances on fact as well as law and the decisions of the special courts for excess of powers. The Councils of Prefecture are composed of three

Freedom of appeal.

Procedure simpler and more inquisitorial.

Organisation of administrative courts in France.

Special and general courts.

Council of Prefecture.

Council of State.

Constitution and powers of Councils of Prefecture.

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 232.

(b) Harris, *Problems of Local Government*, p. 138.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 225-226.

or four councillors and the Prefect, all professional paid officers. The Councils, as has been stated before, are also the administrative councils of the Prefects and in this way are brought into daily contact with the work of the administration (a). Besides general jurisdiction over a variety of administrative matters, a Council of Prefecture entertains disputes over contracts and torts made and committed by the administration relative to the public works of both the central and local administration, to the public domain of the State and contracts for materials and supplies to the central administration. The Council has also a police jurisdiction in respect of violations of police ordinances relative to the main roads, the draining of marshes and quarries. Finally, the Council of Prefecture acts as a board of audit for the accounts of officers of *quasi*-public corporations and of the less important communes (b).

Organisation  
of the Council  
of State.

63. The organisation of the Council of State as an administrative council and as a court has been already outlined in a previous lecture (c). Its judicial section, with which we are at present concerned, is composed of five Councillors of State, and a certain number of commissioners and auditors. It decides alone all the less important matters and, for more important matters, it holds the preliminary examination, the actual decision in these cases resting with the whole Council which is then said to be acting *en contentieux*. It has general administrative jurisdiction (*contentieux administratif*) both original and appellate. Appeals from the decisions of the President and the Ministers which violate a private right go to it as to an original court. It has also a certain original jurisdiction in respect of complaints against the action of the Prefects. Of its appellate and special jurisdictions I have already spoken, the former enabling it to review the decisions of courts of lower instances on facts as well as on law and to substitute its own decision for that of the court of original instance. In exercise of its special jurisdiction it can only annul the act or decision challenged upon grounds which have been already discussed (d).

Its original,  
appellate and  
special juris-  
dictions.

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(a) See Lecture IX, para. 33, *supra*.

(b) Goodnow, Comparative Administrative Law, Vol. II, pp. 233-235.

(c) See Lecture X *supra*, para. 12.

(d) Goodnow, Comparative Administrative Law, Vol. II, pp. 229-230, 238-9, and *supra*, paras. 58 and 60.

64. The German administrative courts, like the French, are courts of enumerated powers. The general theory is that the action of the administration when acting as a public power is free from all judicial control whether of ordinary or of administrative courts. But by statute some powers of control have been conferred on the ordinary and administrative courts respectively. As in France, ordinary courts have exclusive jurisdiction over crimes. Power given to the administration to decide in the first instance certain private law cases (e. g. decision of disputes between inn-keepers and their guests) are subject to review by ordinary courts, and where the law recognises that the Government is bound to pay an individual indemnity for an invasion of his property rights, the ordinary courts are to decide the amount of the indemnity, but not usually to consider the question whether the administration was acting legally, which question must be decided by the administration or the administrative courts as the case may be. When the law permits administrative execution in the enforcement of money payments due to Government, appeal may be taken to the ordinary courts if such execution is directed against real rights. In Prussia the individual may appeal to the ordinary courts against acts of the administration in tax and police matters.

German administrative courts.

Extent and limits of their jurisdiction.

65. Germany being a federally organised government, there are Imperial as well as State administrative courts. The Imperial administrative courts are all courts of special jurisdiction. Mr. Goodnow enumerates the following classes of Imperial administrative courts: (1) Imperial Poor Law Board, (2) Imperial Fortress Belt Commission, (3) Imperial Railway Court, (4) Imperial Patent Office, (5) the Disciplinary Courts and Chambers, highly important bodies which decide as to the removal of officers in the Imperial administration and the imposition upon them of disciplinary penalties, (6) Imperial Superior Marine Office. These courts, says Mr. Goodnow, are all of them practically independent of the administration. Their organisation, which is often peculiar, and their jurisdiction are fixed in the law originating them. The members are administrative officers enjoying, as all German officials do, an irremovable tenure. In the Imperial Railway Court certain judicial officers are added to the Railway Commission which then takes the name of the Railway Court which decides

Imperial administrative courts.

conflicts between the Commission and any railway administration (a).

Prussian administrative courts.

Extent and nature of their jurisdiction.

66. The Prussian administrative jurisdiction needs special examination, as the greatest pains have been taken in recent years to establish it on a satisfactory footing to afford protection to individuals against interference by the administration. It is modelled on the French but no slavish imitation thereof. As in France, appeals lie to administrative courts only against special administrative acts, not against ordinances, though on appeal from a special administrative act performed in order to enforce an ordinance the administrative courts may consider collaterally the question of the validity of the ordinance. Also only acts which have a tendency to violate private rights are as a rule matters for complaint before administrative courts. But every violation of private right does not give a right to invoke the jurisdiction. In each instance a special provision of law must be found to authorise it. But there is a general provision authorising appeals from all acts of the administration relating to what are called police matters, i.e., resulting from the exercise of the police power. Complaints lie on the ground that the police authorities have not applied the law or have applied it wrongfully in conditions not justifying its application. "As these police orders," says Goodnow, "constitute by far the larger number of the acts of the administration in the administration of internal affairs, and as the rule permits the administrative courts to review the decisions of the administration not only on questions of law but also on questions of fact, the control of the administrative courts over the administration of internal affairs is quite an extended one." Not only individuals but public corporations may appeal to these courts against the decisions of the supervisory authorities made in the exercise of the central administrative control over public corporations and their officers. In a few cases, e.g. in cases of elections, appeals to administrative courts are allowed in the interest of the maintenance of the law, though no right has been violated. Appeals to administrative courts, it should be remarked, have as a general rule a suspensive effect, except in cases where suspension may cause serious harm to the public weal, but even this exception is not allowed where the decree

(a) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 245-247,

of the administration directs the arrest of a person and the administration must await the decision of the administrative court or the expiry of the time allowed for an appeal to the administrative court.

67. It must be remembered, however, that the administrative courts of Prussia have yet to acquire jurisdiction over the decisions of the ministers and, as a rule, over the decisions of officers of the central administration in the localities except in so far as they relate to the administration of internal (local) affairs and to the purely local taxes (a).

No jurisdiction over acts of ministers and central officers in the localities.

68. As to the organisation of the Prussian Administrative courts, these courts (according to Mr. Goodnow) are divided into courts of first instance and appellate courts. For a large class of cases, however, there are three instances, for the appellate courts for some cases are courts of first instance for others. I have already pointed out that the Highest Administrative Court is composed of professional lawyers versed in administrative law and entirely independent of the administration. But in the lower instances, the judges are either wholly or predominantly lay and unpaid, but they are also men actively concerned in the day-to-day work of the administration. The tenure of the judges of the administrative courts in Prussia (differing herein from that obtaining in France) is independent over against the active administration.

Organisation of Prussian administrative courts.

69. The following grades of administrative courts exist in Prussia : (1) The Circle Committee in the rural districts and the City Committee in the City Circles. The former is composed of the Landrath who is an appointee of the Central Government and six non-professional members elected by the Circle Diet from among the inhabitants of the Circle. The City Committee is similarly composed of the Burgomaster, an appointee of the Central Government, and four municipal citizens chosen by the City executive. The President and one at least of the members must be qualified for the judicial or the higher administrative service. "The jurisdiction of these courts", says Mr. Goodnow, "as enumerated in the statutes embraces all cases which arise between communes relative to their boundaries and to the apportionment of common charges

Grades of administrative courts.

(1) Circle Committee and City Committee.



such as for roads and schools, local taxes, common enjoyment of public instructions and communal property, complaints relative to the enjoyment or loss of membership in the commune or the smaller city, appeals in regard to communal elections, difficulties relative to the civil service, i. e., to the imposition of disciplinary penalties on the non-professional officers, appeals by local authorities from the decisions of supervisory officers, difficulties relative to the quartering of soldiers and military requisitions in time of peace, various difficulties, relative to the police, of highways, waterways, building, commerce, industry and hunting; complaint against the action in local police matters of all local police authorities" (a). In important matters arising within the circle or city, appeals sometimes lie direct to the next higher administrative court, the District Committee. (2) The District Committee, which has territorial jurisdiction over the Government District already described in a previous lecture (b). The District Committee as an administrative council has been fully described in that lecture. When sitting as an administrative court, the Government President takes no part or share in its deliberations and it is presided over by an Administrative Court Director appointed by the Crown, who with another professional member, both holding life appointments, and four unpaid elected lay members constitute the court. It exercises appellate jurisdiction over the decisions of the Circle and City Committees and has original jurisdiction over the affairs of Rural and City Circles of over 10,000 inhabitants, similar to that which the Circle Committee has over the affairs of the communes and less important cities (c).

(1) District Committee.

(3) The Superior Administrative Court.

70. The Superior Administrative Court is composed of judges holding life appointments from the Crown, half of whom must possess qualifications necessary for the judicial service, the other half being persons qualified for the higher administrative service. It can sit in panels, but may meet in general assembly whenever necessary to secure uniformity in the decisions of the several panels. The courts acts as a court of appeal, as a court of cassation and, in a few instances,

(a) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 251-253.

(b) See Lecture IX *supra*, para. 35.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 253-254.

as a court of original jurisdiction. As a court of original jurisdiction, it decides as a rule simply complaints against the decisions of the highest officers in the localities, viz. Governors of Provinces and Government Presidents, where so allowed by statute.

71. Finally, says, Mr. Goodnow, the procedure in all the administrative courts is generally oral and the sessions are public, but this may be changed by consent. The procedure is also, as in France, somewhat inquisitorial in character, but in the main controversial (a). Procedure.

72. Some characteristics of the Italian administrative courts I have noted in another place (b).

73. I have previously indicated why I consider administrative courts to be the tribunals best adapted to do justice between individuals and public authorities in matters needing special knowledge, as most matters of importance affecting the administration appear to do at the present day in increasing proportion. The fact that the institution grew within the heart of bureaucracy means no discredit to it since it has regulated and humanised the bureaucracy within which it has evolved. Bureaucracy being, as I have shown, nascent in the present day English and American administrations, I cannot conceive of a better antidote to it than the establishment in those countries of administrative courts, not superseding but supplementing the beneficent working of the ordinary courts. The establishment of administrative courts in those countries is, I think, inevitable, though it does not appear to be viewed as urgent by English publicists, and some amongst them even entertain the hope that the Superior Courts of England may develop a jurisdiction which will restore the rule of law which admittedly has been seriously jeopardised by modern legislation the necessity of which in the public interest seems undeniable. I have given reasons for concluding that this is a vain hope. But England can wait and so can America. But the one country which cannot wait for such a development is India, even if that which is to develop this new jurisdiction were not itself, as in fact it is, greatly wanting. Bureaucracy is not morely nascent in India. Administrative courts—  
a present  
necessity in  
India.

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(a) Goodnow, *Comparative Administrative Law*, Vol. II. pp. 255-256.

(b) See Lecture V *supra*, para. 32.

Nor does it practise excessive self-denial in granting itself large and judicially uncontrolled powers which, however beneficent in their intended exercise, do not somehow operate with equal beneficence in actual working. Administrative courts, I venture to think, will fit naturally into the present system of administration in India (a). In England and America the absence of administrative courts may not be seriously felt so long as people believe in the political control which the representative legislatures of those countries are supposed to exercise over the administration, a matter which will form a subject of enquiry in the next lecture. The fact that there are no representative legislatures in India and that there "the Civil Service is the Government" makes the argument in favour of establishing administrative courts conclusive. There is, I firmly believe, no mediating between officialism and law otherwise than through administrative courts.

Revenue  
courts in  
India if true  
administra-  
tive courts.

74. I have shown that the establishment of administrative courts will not be a new experiment in England. Neither will it be in India. The Revenue courts of India are in a manner administrative courts. But I certainly do not advocate a further extension of these courts or their jurisdiction. Revenue courts of India, manned as they are by administrative officials, limbs of the active executive, possess large jurisdictions in private law matters. This is without precedent in any other country and altogether undesirable. Were the archives of the numerous Settlement offices open to public examination, they would, I apprehend, not rarely disclose operations initiated from policy, effecting wholesale transfers (in the name of records) of rights. The adjustment of private law claims between citizen and citizen should be left to be regulated by the orthodox method of direct legislation enforced through the ordinary courts of law.

(a) The Reform proposals recently submitted to Parliament by Mr. Montague and Lord Chelmsford do not promise any change of conditions in regard to matters dealt with in this and the previous lectures. On the other hand, the Rowlatt Committee has recommended the permanent incorporation in the Indian Statute-book of certain provisions of the Defence of India Act which materially nullify the "rule of law" in India. These circumstances, I submit, add cogency to the arguments in the text for the establishment of real administrative courts in India.

75. At the meeting of the Congress of Administrative Sciences at Brussels in 1910, the delegates passed the following resolution :—"The Congress is of opinion that the administration is subject to the rules of law ; that citizens should have a legal appeal wherever the law is violated and that it is desirable to surround this appeal with guarantees of justice in form and substance." (a). If I were wanting a motto to place at the head of the present lecture, would I need a better one ?

LECTURE XXIV.  
CONTROL OF THE ADMINISTRATION—  
LEGISLATIVE AND ADMINISTRATIVE (1).



1. The judicial control considered in the last lecture is only one of several forms of control by which the administration is made to do its duty towards the population under its charge. In a treatment of administrative law, the judicial control naturally assumes special prominence but its importance should not, for that reason, be exaggerated. Of the several forms of control to be presently enumerated, it is the one which has developed fast in point of time, and it can in no event hope to displace the other forms, with which it co-exists even in systems in which it has made the greatest progress. The forms of control which are found operating in varying degrees in most modern administrative systems may in the order of their historic origin be enumerated as follows :—(i) Administrative (or executive) control of higher over inferior authorities ; (ii) Legislative (or Parliamentary) control (c) ; and (iii) Judicial control. I had occasion to notice in the last lecture that the judicial control grew up in England and still more in France, out of the administrative. It will not be difficult to prove that what has been variously called the “Legislative,” “Parliamentary” or “Political” control of a representative assembly was also in its

Three kinds of control over the administration found simultaneously in operation in most modern systems.

Historic order  
of their  
growth—  
Judicial and  
Legislative  
control  
variants of  
the Adminis-  
trative.

(a) Harris, *Problems of Local Government*, p. 142.

(b) For a proper understanding of the present topic students will do well to read Goodnow's *Comparative Administrative Law*, Book VI, Division III, Chs. II and III.

(c) Dr. Redlich's name for it is "Political" control. Redlich and Hirst, *Local Government in England*, Vol. I, p. 322.

The Legisla-  
tive control,

No historic  
connection  
between the  
controls of an-  
cient assem-  
blies and mo-  
dern legisla-  
tive bodies.

inception indistinguishable from the Administrative. In dealing with the working of the Greek assemblies, I took pains to establish that these assemblies really constituted the highest executive in ancient political communities, and that the earliest "laws" of these assemblies were in character really "adminstrative resolutions." (a). The control, however, which modern legislative bodies exercise over the administration is not historically connected with that which the assemblies exercised over their officials in ancient communities. The latter were literally extinguished by the Roman monarchy. The Parliamentary control over the executive, as we know it now, is a post-Feudal development, genetically distinct from anything resembling it in the ancient world. Its historic predecessor, as that of the judicial control, was again the administrative control of the monarch. It is exercised by legislative bodies to-day in so far only as these have succeeded in taking it out of the hands of the King, and it is powerful or weak in proportion as the displacement has been extensive or partial.

Essential  
difference  
between the  
control as  
exercised by  
the ancient  
assemblies  
and that of  
modern  
Parliaments.

Ancient  
assemblies,  
supreme  
executive.  
There was no  
separate cen-  
tralised ex-  
ecutive in An-  
cient City  
States as there  
is in modern  
governments.

A centralised  
executive  
government a  
necessity in  
modern  
States.

2. There is, too, an important difference between the character of the control exercised by ancient and modern assemblies respectively. There was nothing in the Ancient City States or in Republican Rome corresponding to the centralised executive governments of modern times. There were administrators of different ranks and exercising different functions but they were all servants of the assembly of citizens which was the supreme executive. All modern systems of Government, on the other hand, are built round the frame-work of a centralised monarchy—the heritage which Occidental nations have received from the Roman Empire. The judicial and legislative controls have been superimposed upon this structure, and if there should be (as during the war just ended they came to be) temporarily suspended, the normal working of the government will not suffer immediate disruption. The fact is, as has been pointed out before, that a centralised executive is indispensable to any but small city governments like those of Greece or Medieval Italy, whose officials could be directly controlled by an assembly. It follows, therefore, that however well developed may be the judicial and the legislative control in

any system of Government of the present day, it will never do away with or make unnecessary that which has been called administrative control.

3. Far, indeed, from it. For, as we have already noticed, modern conditions have been forcing the legislature, even in countries where the executive has been completely subordinated to the legislature, to confer on the executive not merely freedom of action in matters of administration proper, thereby allowing it to seriously encroach upon the jurisdiction of the judiciary, but actually to surrender in its favour in increasing measures the very prerogative of legislation (a). In describing recent developments, it may therefore be said with justice that both the judicial and the legislative control have been perceptibly weakening. So much the greater, in the public interest, is the necessity for strengthening departmental discipline and through it the administrative control of the central authority. But before I take up the subject of administrative control, it will be convenient to deal in some detail with the legislative or Parliamentary control.

4. The control of modern assemblies over the administration, as I have previously pointed out, grew out of the pecuniary necessities of Feudal and post-Feudal Kings. It was through its "power of the purse" that Parliament in England won its present exclusive power of legislation. But neither the power to control supplies and expenditure nor exclusive legislative capacity, powerful weapons though they are in the hands of an assembly to force its policy on the executive, would by themselves enable the assembly to exercise direct control over the administration in its detailed working. Exclusive power of legislation and complete control over the supplies, the Parliament of England secured so far back as the fifteenth century. The control over expenditure was assumed in the seventeenth. But the Parliamentary or Cabinet form of Government, implying, as it does, direct subordination of the executive to the legislature, did not attain maturity till another century later. I have in a previous lecture (b) given reasons for supposing that the non-Parliamentary executive which is

And in fact growing at the expense of the other organs of the State.

Genesis of Parliamentary control in modern States, in the "power of the purse"

Exclusive power of legislation consequent upon it.

More direct control attained in England through the evolution of Cabinet Government.

(a) The reference, I need hardly say, is to the growing ordinance powers of the administration, under statutory authority.

(b) See Lecture X *supra*, para. 23.

Legislative control in States possessing representative legislatures but executives independent thereof and in States not possessing representative legislatures also to be studied.

found in several countries possessing representative legislatures is a transitional form of Government and that all forms of Government of the present day are tending towards the Parliamentary form with varying rapidity. But until this consummation is finally reached everywhere, one must take into account the final as well as the transitional forms. The fact, moreover, that the present comparative study of institutions has been made to include Indian and other forms of Government which do not possess a representative legislature makes it necessary to study other and even more rudimentary forms of legislative control.

Nature of the control exerciseable through the exclusive power of legislation, indirect yet powerful.

5. Exclusive power of legislation may be possessed by representative assemblies equally in Parliamentary and non-Parliamentary forms of Government. The control exercised through it, though indirect, may nevertheless be very powerful and effective. The executive in non-Parliamentary forms of Government may be under no obligation to receive and carry out the recommendations of the legislature framed not as laws but as resolutions. It may not allow the legislature, once it has conferred discretionary authority on it, to dictate how that discretion is to be exercised. But the obligation to obey and execute every law made by the assembly, however unpalatable to the executive, can be used by the legislature, if it be at all in earnest, to make its will ultimately prevalent on the administration. All this, however, can have no application to countries like India where the legislature is actually controlled by the executive, Indian legislation being, as I have previously pointed out, in reality executive legislation (a).

Such control non-existent in India

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(a) The Montague-Chilmsford Reform Scheme recently submitted to Parliament proposes to set up representative legislatures in the Provinces with power to pass laws relating to particular departments to be made over to them without interference by the Executive Government unless they should trench upon the Government's reserved sphere of control which would include all laws concerning the peace, order and good government of India and departments not transferred to the representative bodies. The Legislative Assembly of the Government of India too is to have an elective majority and all laws will have to be passed by it unless they concern the peace, order and good government of India over which the Government of India is to retain plenary control. All such laws and laws affecting the "reserved" subjects in the Provinces the Government will have power to pass through the Grand Committee of Provincial legislative bodies and the Council of State, the proposed second Chamber of the legislature of the Governor General, both of which

6. The power of the purse also may belong equally to Parliamentary and non-Parliamentary legislative bodies. There are three elements which at the present day go to the making of this power. These are: (1) Power to vote supplies. (2) Power to make appropriations and thereby to control expenditure. (3) Power to examine accounts. As every act of the administration costs money, it is obvious that the power of the purse where it exists places the administration in a position of indirect subordination to the legislature.

Power of the purse places executive Government in indirect subordination to the legislature.

7. There is no truth in the popular belief that in England all supplies have to be annually voted by the Parliament. About three-fourths of the whole annual expenditure is made under the authority of permanent Acts of Parliament and without the sanction of a special Parliamentary annual vote. The interest on the national debt, the sums payable for the civil lists, annuities payable to the Royal family, pensions, certain salaries and allowances, the expenses of the courts of justice together with certain other charges, are imposed by permanent statutes and are charged upon the Consolidated Funds (a). At present, estimates annually presented to Parliament refer to the following expenses, viz: the army estimate, the navy estimate, miscellaneous civil service estimate and revenue department estimate. The reason for keeping the expenses of the army and navy on the annual estimates is partly historical and partly owing to the condition of the country which being surrounded by the sea did not need to keep its military forces on a perpetual war-footing in the same way as Germany. The fact that the major portion of the national expenditure is provided for by permanent statutes does not of course remove it altogether from the control of Parliament for there is no constitutional check upon Parliament repealing or modifying such statutes, though undoubtedly it dispenses with the necessity of the Government asking for grants covered by them every year. It would be so obviously unbusiness-like to put all supplies on the annual estimates, that even

Nature of the control over supplies as exercised by British Parliament.

Permanent and annual grants.

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bodies will possess a standing Government majority, though as proposed the majority will in either case be a bare majority. The most important part of Indian legislation will thus continue to be executive legislation.

(a) Traill, Central Government, p. 42.



Control of British Parliament over both kinds of grant in theory equally absolute.

The English Parliament with its deep-seated jealousy of the executive did not at any time attempt it. While some portion of the supply is therefore undoubtedly retained on the annual estimates with the sole object of maintaining the Parliament's hold over the current administration, the division into permanent and annual grants is in England on the whole a matter of convenience, the ultimate control of Parliament being in theory equally absolute in respect of both kinds of grants.

Congress's control over supply in the United States.

8. Supply in the Federal Government of the United States appears at present to be regulated almost wholly by permanent statutes, subject of course, as in England, to modification at any particular session of the Congress by special legislative measures. Thus the customs duties and the internal revenue taxes, from which two sources most of the revenue of the Government is obtained, are both fixed in amount by permanent law, and this appears to be the case also with other receipts of the Government, such as tonnage dues and the receipts of the post office and from the sale of public lands (a).

In the German States, permanent grants cannot be altered by legislature without the consent of the Prince.

Larger legislative control over receipts in the German Empire.

9. It is otherwise in Germany. The constitutions of most German States, notably of Prussia, lay down that the taxes fixed by law shall continue to be collected until the law fixing them has been repealed or amended and this in Germany can never happen without the consent of the Prince (b). In the States of the German Empire therefore, the receipts of the Government are independent of the yearly action of the legislature in a more real sense than they are in England. The receipts of the Imperial Government, however, as fixed by permanent laws, are stated to be a very small part of the receipts of the Empire, and even the matricular contributions by the States of the Empire, which each State is allowed to collect in accordance with Imperial laws to be made over to the Imperial exchequer, is fixed annually by the Imperial legislature (c).

(a) Goodnow, *The Principles of the Administrative Law of the United States*, pp. 450-451.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 277-8.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, p. 277.

10. In France alone is the Government entirely dependent upon annual votes for all its receipts, a circumstance which Mr. Goodnow attributes to a misreading by French publicists of the practice of the English constitution (a).

Complete control of the Chamber over receipts in France.

11. Indian revenue falls under two heads: (1) That which is assumed to require legislative sanction; and (2) that which does not need any such sanction, annual or permanent. The revenue derived from salt, customs, excise, assessed taxes, provincial rates, stamps, registration and opium come under the first head. The two considerable items under the second head are tributes and contributions from the Feudatory States, and the land revenue. The assessment and collection of land revenue (except in permanently settled areas) is treated by Government as a matter of prerogative and so dependent purely upon executive discretion, with the result that between 40 and 50 per cent. of the net public revenue is removed from all legislative control and in fact from all legislative discussion. As to the other items of taxation, though they are regularly voted upon (not however annually) by the Legislative Council of the Governor General, there is, it has been suggested, no definite statutory prohibition apart from the principles of the English constitution in the way of the Executive Government imposing a tax without reference to the Legislative Council. The practice, therefore, of having these revenues voted by the legislature appears to be based not upon law but upon constitutional usage. But the usage, after all, does not amount to much when it is considered along with the fact that the majority of the votes in the Council of the Governor General is controlled by Government (b).

The revenues of India.

Land revenue and tributes from Feudatory States beyond legislative discussion.

Other taxes are by constitutional usage passed through the Legislative Council, but as a matter of form only.

(a) *Ibid*, p. 278. If the practice was in fact introduced by mistake, its maintenance without modification must be due to deeper causes. The jealousy of the legislature towards the executive is, owing to painful experience, more acute in France than in England. In France, it is a crime even to collect a tax which has not been authorised by an annual vote of the Assembly. *Ibid* p. 279.

(b) Iyengar's Indian Constitution, 2nd Edn., pp. 203-206. Under the Montague-Chelmsford Scheme of Constitutional Reforms now under consideration the Government of India is given power to pass fiscal bills over the head of the Legislative Assembly (which is to have a substantial elective majority) by the proposed Council of State which is to possess a standing Government majority. See the Report, para 284.

Nature of the control of the British Parliament over expenditure.

Parliament and annual appropriation.

12. Parliamentary control over expenditure is of much later origin than control over supplies. In the beginning the English Parliament never troubled itself as to how the money it voted to the King was spent by him. It was the supposed abuses of the financial administration of the kingdom by the Stuart Kings that led Parliament from 1676 onwards regularly to designate the purposes for which the money voted should be spent by the insertion in the bills of what are called "appropriation clauses". Later developments have almost reversed the process, Parliaments nowadays showing themselves more jealous about expenditure than about supply. Some even of the appropriations, however, have to be permanent ones. Some of these I have specified in dealing with the topic of supply, e.g., items on the civil list of the Crown, expenses of the public debt and the salaries of judges and ambassadors. As to others, the control of Parliament over appropriations might obviously lead to embarrassments and abuses but for the salutary (conventional) rule, under which no appropriation of any importance will be made except on the proposition of the Government. In the same spirit, Parliament refrains also from materially interfering with the estimates proposed by the administration, unless it has on general grounds resolved to turn out the administration, for a sensible alteration of the estimates is regarded as equivalent to a vote of want of confidence (a).

Control of Congress over appropriation in the United States.

Permanent appropriations.

13. In the United States also there are permanent appropriations which cover, in addition to debt payments, the expenses of collecting the customs duties, salaries of judicial officers and the expense of purchasing a certain amount of silver each year to keep up the price of silver with a view to the ultimate adoption of a complete bimetallic standard. The Supreme Court has moreover held that the fixing of the salaries of officers by permanent laws amounts to an authorisation of Government to make permanent annual appropriations. "The result," says Mr. Goodnow, "is that more than half the current expenses of Government exclusive of pensions and salaries are beyond the reach of any particular Congress." The particular expenses of the Government which are under

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(a) Lowell, Government of England, Vol. I, Ch. XIV. Traill, Central Government, p. 54; Goodnow, Comparative Administrative Law, Vol. II, p. 280.

the control of each Congress are those of the Army, the Navy, and the other branches of the administration with the exception of customs. Neither the Congress, nor the Legislatures of the States, however, have, as has the English House of Commons, divested themselves of the right to make appropriations other than those proposed by the administration (a).

14. In France, the Legislature's control over expenditure is as absolute as its control over supply. Estimates submitted by the Executive are cut down and new appropriations made with embarrassing freedom (b).

Control of the Assembly over appropriations in France.

15. In the German Empire, whilst some expenses are sanctioned by permanent laws, others are fixed by law for terms of years, and others still (and by far the larger part) by annual appropriations. Amongst expenses fixed by permanent laws are interest on the Imperial debt, and the expenses of all institutions and authorities which owe their establishment to permanent laws. The main expenses fixed for a term of years are the expenses of the Army, the German Empire on account of its unprotected land frontiers not being in a position to rely on annual votes for the maintenance of its military forces (c).

Appropriations in Germany—Permanent, for fixed terms and annual.

16. As it must be impossible for either the Parliament or the Administration to foresee all possible expenditure that it may be necessary to incur in the course of the year, the administration has very often to overstep the appropriations. Such contingencies are provided for by law in France, and in England, but in other countries, the administration has generally to take the risk of breaking the law, the breach being subsequently legalised by an Act of Indemnity (d).

Control over unforeseen expenditures.

17. Public expenditure in India, even more than receipts, is both in theory and practice absolutely uncontrolled so far as the legislature is concerned. The resolutions which the Councils are now authorised to pass at the consideration of the

No legislative control of expenditure in India

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(a) Goodnow, *Principles of the Administrative Law of the United States*, pp. 453-456.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, p. 287; Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 114-115.

(c) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 288-289.

(d) *Ibid.* Vol. II, p. 290.

Control of the  
India Office.

Financial Statement and the Budget operating only as recommendations are "moral" means of influence and not "legal" weapons of control (a). In place of it section 21 of the Government of India Act of 1915 (formerly section 41 of the Act of 1858) provides that the expenditure of the revenues of India, in British India and elsewhere, is subject to the control of the Secretary of State in Council, and no grant or appropriation of any part of these revenues or any other property coming into the possession of the Secretary of State in Council, by virtue of the Government of India Act of 1858 or the Government of India Act of 1915, can be made without the concurrence of a majority of votes at a meeting of the Council of India. Indian public expenditure is either incurred in England or in India. Roughly speaking expenditure in England is incurred only on the authority of the Secretary of State in Council. Expenditure in India is incurred by the Government of India according to Rules approved by the Secretary of State in Council. The Governor-General in Council in turn has delegated some of the powers thus vested in him to the Provincial Governments subject to conditions imposed upon the latter by himself (b).

Examination  
of accounts.

18. It is obvious that Parliamentary control over expenditure must fall very short of the real thing, if it stopped at appropriations and if it did not carry with it the right of examination. "All constitutions," says Goodnow, "grant some such power to the legislature and the usual rule is that the legislature makes use of some authority independent of the administration to aid it in the examination it makes." In France, Germany and England, this examination is conducted

(a) The Montague-Chelmsford Reform Scheme recently submitted to Parliament does not propose any change in this respect so far as the budget of the Government of India is concerned. It will be introduced in the lower House, the Legislative Assembly, but the Assembly will not vote it. Resolutions upon budget matters as upon all other questions will continue to be advisory in character. In the Provincial Legislatures, the budget will be laid before the Council which will discuss it and vote by resolution. The budget would be altered in accordance with the resolutions of the Council except when the Council reject or modify the allotment on reserved subjects, in which case the Governor will have power to certify its necessity and insist upon its retention. See the Report, paras 256, 284.

(b) "Iyengar's Indian Constitution", 2nd Edn. pp. 202, 203, 206, 212-13, 215.

by persons or bodies who are irremovable by the executive (a). The only exception to the rule is the United States, where the investigation of accounts is made directly by a committee of the legislature, who then report to the House. An adverse decision of the House in England, to whom the examining authority (the Comptroller and Auditor General) reports, may result in a vote of censure with the consequent fall of the ministry. Similar results should follow in France upon the receipt and approval by the Assembly of an adverse decision of the Court of Account, but this hardly ever happens because a change in the ministry generally takes place before the decision is due. In Germany and the United States, where the ministry is not responsible to Parliament, it is not clear what worse consequences may follow upon an adverse decision of the Court of Account or the House than the possible tightening of the laws. The issue of the great constitutional conflict in Prussia over the army appropriation in 1860-1864 seems to show that the legislative control over the finances in Germany cannot be very real (b).

Difference in effect of adverse report in Parliamentary and non-Parliamentary Governments.

19. Sections 26 and 27 of the Government of India Act of 1915 are all the constitutional provisions there are for the independent examination of the accounts of public receipts and expenditure of India. Section 26 says that the Secretary of State in Council shall, within the first fourteen days during which Parliament is sitting next after the first day of May in every year, lay before both Houses of Parliament (i) an account for the financial year preceding that last completed of the annual produce of the revenues of India, distinguishing the same under the respective heads thereof, in each of the several Provinces, and of all the annual receipts and disbursements at home and abroad for the purposes of the Government of India, distinguishing the same under the respective heads thereof; (ii) the latest estimate of the same for the financial year last completed, (iii) an account of all stocks, loans, debts and liabilities chargeable on the revenues of India, at home or abroad, at the commencement and close of the financial year preceding that last completed, the loans, debts and liabilities raised or incurred

Examination of the public accounts of the Indian Government.

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(a) The Courts of Account in the two former, the Comptroller and Auditor General in England.

(b) Goodnow, *Comparative Administrative Law*, Vol. II, pp. 291-295.

within that year, the amounts paid off or discharged during that year, the rates of interest borne by those loans, debts and liabilities respectively and the annual amount of that interest, and (i) a list of the establishment of the Secretary of State in Council and the salaries and allowances payable in respect thereof (a). The section, by clause (2), provides that if any new or increased salary or pension of fifty pounds a year or upwards has been granted or created within any year in respect of the said establishment, the particulars thereof shall be specially stated and explained at the foot of the account for that year. By clause (3) of the section the account is required to be accompanied by a statement prepared from detailed reports from each Province, in such forms as best exhibit the moral and material progress and condition of India. Under section 27 of the Act, His Majesty is authorised by warrant under His Royal Sign Manual, countersigned by the Chancellor of the Exchequer, to appoint a fit person to be auditor of the accounts of the Secretary of State in Council who shall hold office during good behaviour and to empower that auditor to appoint and remove such assistants as may be specified in the warrant. The auditor so appointed is required by the section to examine and audit the accounts of the receipt, expenditure and disposal in the United Kingdom of all money, stores and property applicable for the purposes of Act. All such accounts accompanied by proper vouchers for their support must be produced and laid before such auditor, and all books papers and writings having relation thereto submitted to his inspection, and the auditor may examine all officers and servants of the Secretary of State's establishment, being in the United Kingdom, for any of the purposes stated above. The auditor has to report his approval or disapproval of the accounts with appropriate remarks and observations to the Secretary of State, specially noting cases, if any, in which it appears to him that any money arising out of the revenues of India has been appropriated to purposes other than those to which they are applicable. The auditor is to specify in detail

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(a) Cl. (d) of sec. 26 which required the Secretary of State to lay before Parliament an account of the state of the effects and credits in each province and in England or elsewhere applicable to the purposes of the Government of India, according to the latest advices received, has been repealed by the Amendment Act of 1916.

in his reports all sums of money, stores and property which ought to be accounted for, and are not brought into account or have not been appropriated in conformity with the provisions of the law, or which have been expended or disposed of without due authority, and also specify any defects, inaccuracies or irregularities which may appear in the accounts or in the authorities, vouchers or documents having relation thereto. The auditor, finally, has to lay his reports before both Houses of Parliament, with the accounts of the year to which the reports relate.

20. The power to make laws binding on the executive and the power to grant or withhold supplies are, as I have already explained, but indirect weapons of control. They do not themselves enable the legislature to intervene in the detailed working of the administration. But with powers such as these it would be surprising if a legislature did not seek to exercise a more direct control over the actual working of the administration. The success of all such attempts on the part of the legislature, of course, depends in a large measure upon the degree in which the legislature should have succeeded in obtaining control over the appointment and dismissal of ministers. Where, as in Germany and in the United States, the executive is independent of the legislature, direct control of the administration by the legislature is well-nigh impossible of attainment, for the legislature in such Governments can never turn out a minister by a mere vote of censure or want of confidence. In the United States where members of the Congress are excluded by the constitution from accepting State appointments, the very means of influencing ministers by participation in debate is wanting. The only direct control which the legislature can exercise over the administration is through its committees, with whom the administration always find it worth its while to be on good terms in order to prevent deadlocks which easily occur in non-Parliamentary forms of representative government. The committees of the legislature have power to supervise generally the working of the particular departments and may also be appointed to investigate particular abuses. In the performance of this work, the committee may persuade the Houses to censure the administration, but such censure has no political or legal, and according to Mr. Goodnow (a), but

More direct control where legislature can appoint and dismiss ministers.

Ministers are only independent but cannot even participate in debate in United States

Control through committee



very little moral effect. The control of the legislature in the United States is therefore on the whole indirect only (a).

In non-Parliamentary governments in Europe ministers generally authorised to sit and speak in the House.

And are subject to interpellations.

What interpellations mean on the Continent of Europe.

21. The state of things would not be materially different in countries on the Continent of Europe, where, as in Germany, the executive do not hold office at the pleasure of the legislature. But profiting by American experience and more to enable the ministers to meet the criticism of the members of legislative bodies than to be influenced by them, many Continental constitutions provide that a minister who is not a member of the House should have the right to sit in and address the House though he may not vote unless he is a member. This right, however, is generally joined with the inconvenient accompaniment of an obligation to answer interpellations, which on the Continent do not, as I shall presently explain, merely mean furnishing informations or answers on particular points of public interest, but may lead directly to the passing of votes of censure by the House with reference to the matter raised in the questions. In the British system, any question may be put to a minister by a member of the House, and the minister supplies the answer if it is not against the public interest to do so. If it is, he may refuse to answer, but in either case no debate follows upon the answer or the refusal to answer. Such a debate can be raised later on upon a motion to adjourn or in other ways which need not be mentioned here. But on the Continent (and in France in particular), the interpellation may be followed by a debate

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(a) The Montague-Chelmsford Reform Scheme, now under consideration by the Parliament, proposes to retain the control of the administration in the Government of India in the hands of the Governor-General and his Executive Councillors who cannot be appointed or dismissed by the legislature. In the Provinces, much the most important affairs are to remain under the control of the Governor's Executive Council, the members whereof are to be independent of the representative legislative bodies to be set up in the Provinces. Even as to matters to be made over to these bodies, the ministers in charge of them will be appointed and dismissed by the Governor in the beginning, though they must be elected members of the legislature. It is, however, expected that before long the legislatures will obtain power to dismiss ministers. The Report on the other hand proposes to associate with heads of departments in both the Provincial and the Indian Governments standing committees of their respective legislatures, whose functions however will be advisory. See the Report, paras. 214-224, 235, 285, 286. The Provincial committees will be wholly elected, whilst the committees of the legislature of the Governor General will be two-thirds elected and one-third nominated.

and vote on an order of the day expressing the opinion of the House (a). But an adverse vote whether following upon an interpellation or arising from any other circumstance has, in countries where the ministers do not hold office at the pleasure of the legislature, as little effect as it has in the United States.

22. But in France, where a thoroughly Parliamentary system has been established, the institution, whilst it enables the legislature to some extent to exercise legitimate supervision over the administration, more often contributes to the weakening of the administration and the impairing of its continuity and efficiency. Its effect is said to be particularly disastrous in countries like France and Italy which have not yet developed the two-party system which appears to be one of the conditions of the efficient working of the Parliamentary system, since in the absence of a stable majority of its own supporters, Continental ministries (which are perforce coalition ministries) are easily wrecked over motions which, on purpose, the enemies of the Government so contrive as to catch the largest numbers of votes against the Government. In France, according to Mr. Lowell, interpellations are systematically employed to bait ministers and to bring about resignations. This form of interpellation which is used solely to expose defects may, says Lowell, have its justification in despotic governments, but is entirely vicious in governments where the ministry hold office at the pleasure of the legislature. The Parliamentary system, he holds, requires an entire harmony, a cordial sympathy and a close co-operation between the ministers and the chamber, and to the obligation on the part of the cabinet to resign when the majority withdraws its approval, there corresponds a duty on the part of the majority to support the ministers heartily so long as they remain in office. But though this is the opinion of an outside observer,

Interpellations in France and Italy.

Mr. Lowell's criticisms thereon.

As weakening the administration.

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(a) In this connection, Chs. XVII and XVIII of Lowell's Government of England, Vol. I, are particularly instructive. In Prussia, ministers are free to answer questions or not as they please (Lowell, Governments and Parties in Continental Europe, Vol. I, p. 300) and in Switzerland the Council of State decided in 1879 that an interpellant might declare whether he was satisfied with the answer he got, but that no debate must follow upon it. *Ibid*, Vol. II, p. 200. In Italy the debate and vote cannot proceed immediately as in France but on a future day. *Ibid* Vol. II, p. 210.

Arguments  
in favour of  
the system.

the French people themselves do not see these things exactly in the same light. To them the privilege appears as one of the main bulworks of political liberty for they urge, not altogether without reason, that the administration, in so far as it is not subject to supervision by the courts of law (and in very many important matters it is altogether independent of judicial control), this is the only way by which it can be brought to account for its acts (a). †

Control by  
committees of  
the legisla-  
ture in Fran-  
ce open to  
similar criti-  
cism.

23. Mr. Lowell views with equal disfavour the somewhat searching examination and control to which the acts and proposals of the ministers are subjected by the committees of the legislature (more or less casually convened panels of a heterogeneous political complexion) who have no part or share in the business of the administration, do not feel its responsibilities and are ordinarily out of sympathy with the aims and policies of the ministers. Measures proposed by Government seldom come out of the committee without serious mutilations, the budget itself being in this way waylaid and altered behind the back of the Government. The committee system also, Lowell thinks, is out of place in a truly cabinet form of government, the essence of which is that the ministers individually and collectively must be given complete freedom of action and be allowed to act with a full sense of personal responsibility, or be relieved of it altogether. Ministers in Parliamentary governments, he urges, should not be compelled to carry out policies not their own or having little or no relation thereto.

Mr. Good-  
now's con-  
demnation of  
the system of  
control by  
committees  
and inter-  
pellations.

24. Mr. Goodnow is scarcely less explicit in his condemnation of the system of interpellation coupled with control by committees prevalent in France. "Interpellations, addresses, questions as to its policy and censures of the action of the administration have been so frequent that," says he, "the French acting executive has been completely terrorised and paralysed". "If", he adds, "the legislature does not impose bounds upon its control, it may, through its exercise, practically take the place of the administration or reduce it to such a weak position that it will be all but impossible for it to transact properly the business in theory assigned to it." The

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(a) Lowell, *Governments and Parties in Continental Europe*, Vol. I, pp. 117-126.

ministry and the administration become, according to him, the servants rather than the guides of the legislature and naturally become so anxious to win its approval that they are unable wisely to conduct the government (a).

25. Neither Mr. Lowell nor Mr. Goodnow conceal their opinion that in this matter the system which by constitutional usage prevails in England is the ideal which all Parliamentary forms of government should follow. Interpellation in the English Parliament does not lead to a debate and a vote of censure following immediately on it at the height of the excitement raised by it. Questions are put and answers demanded with the utmost freedom. Committees too are freely appointed to investigate the working of a particular department or into particular abuses. But normally these latter issue in nothing more serious than recommendations upon which the necessary action is left to be taken by the administration itself. One need not agree with Mr. Todd when he says that Parliament in England is designed for counsel, not for rule, for advice and not for administration. But it is seldom that the Parliament does in fact proceed to give orders to or in respect of any subordinate officers (b). The result is that so long as the ministers possess the confidence of the House generally, they remain the guides and not the servants of the House and the execution of their policy suffers no disturbance or discontinuity to the detriment of administrative efficiency.

Different conditions in England—Cabinet the guide and not the servant of the legislature.

26. The idea of Cabinet ministers acting in England as the guides and not the servants of the House, which appears to have taken the fancy of foreign observers, is not however viewed with excessive complacency by Englishmen themselves. It has been remarked that under present conditions, Cabinet ministers have come to be the choice of the electorate rather than of Parliament, and members of Parliament are chosen in the constituencies with a view to their supporting rather the chosen leaders of the people than any definitely conceived

Is the English Cabinet growing autocratic?

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 272-3.

(b) On a motion for adjournment or on other suitable occasions Parliament in England may proceed to take votes on a single detail of administration, but an adverse vote in such a case does not necessarily lead to resignation, though when the position of the ministry has otherwise been generally weakened, such a vote may be availed of for tendering resignation.

policy approved by the electors ; so that a member who refuses his support to or attacks the leaders he is pledged to support ends by himself forfeiting the confidence of his constituency. The leaders, they complain, are gradually coming to occupy the position of dictators. Moreover, the opportunities for discussing the acts of the administration have been so greatly narrowed by recent changes in the rules of business, that the Parliament's claim to act as the " grand inquest of the nation " is in fact passing into the domain of fiction (a). Whilst therefore American writers like Lowell and Goodnow are freely condemning the committee system prevalent in France and in the United States and pointing to its absence in the English system as the ideal arrangement, thoughtful Englishmen are seriously considering whether the committee system may not be so adapted to circumstances in England as to place some effective check upon the growing irresponsibility of the Cabinet.

The Indian legislatures have no control over the policy of the executive.

27. It seems almost superfluous to state that the Indian legislature which, as stated above, is lacking in the primary capacity of controlling supplies and expenditure and cannot even make laws binding the executive otherwise than at the initiative of the executive or with its consent has no power whatever to directly influence either the general policy of the administration or examine its acts in detail. It cannot constitute a committee whether supervisory or investigating (b). The very power to put questions to the administration by way of interpellation (in the English sense) was denied to it until 1892. It will be remembered that in 1853, when the Legislative Council of the Governor General, till then composed of the members of his Executive Council and the law member, was reconstituted by the addition to it of two judges of the Supreme Court of Calcutta and Company's servants of ten

Power of interpellation.

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(a) Anson, *Law and Custom of the Constitution*, Vol. II, 3rd Edition. Introduction.

(b) The Montague-Chelmsford Reform Scheme proposes to associate with the heads of departments of both the Government of India and the Provincial Governments standing committees of their respective legislatures, whose functions will however be purely advisory. The committees of the Provincial legislatures will be wholly elected, whilst those of the Supreme legislature will be two-thirds elected and one-third nominated. See the Report, paras, 235, 285.

years' standing appointed by the Local Governments, the Council though composed wholly of officials assumed jurisdiction in truly Parliamentary fashion to ask questions as to and discuss the propriety of measures of the Executive Government, deeming themselves competent to enquire into abuses and grievances, calling for reports and returns from the local administrations, debating long on questions of public interest and introducing motions and resolutions independent of the Executive Government. In a despatch of Lord Canning, he pointed out that the Council had become invested with forms and modes of procedure closely imitating those of the House of Commons, that there were one hundred and thirty-six standing orders to regulate the procedure and that in short, as Sir Lawrence Peel put it, the Council had assumed jurisdiction in the nature of a grand inquest of the nation. During the short period from 1853 to 1861 during which the system remained operative, the Council came into constant conflict with the Executive Government, and so little were its doings liked by the Executive Government in India and the authorities at Home, that when in 1861 the Legislative Council was further expanded by admitting non-official members, the Indian Councils Act of 1861 by section 17 provided that no business shall be transacted at a legislative meeting of the Governor-General's Council other than the consideration of measures introduced or proposed to be introduced into the Council for the purpose of enactment or the alteration of rules for the conduct of business at legislative meetings, and that no motion shall be entertained other than a motion for leave to introduce a measure into Council for the purpose of enactment or having reference to a measure introduced or proposed to be introduced into the Council for that purpose, or having reference to some rule for the conduct of business. Similar restrictions were imposed upon the reconstituted provincial legislatures.

As exercised  
between 1853  
and 1861.

Taken away  
by the Coun-  
cils Act of  
1861.

28. These restrictions were somewhat relaxed by the Indian Councils Act of 1892, which permitted (1) the asking of questions in regard to the administration under strictly limited conditions by members of the Council for the purpose of eliciting informations; and (2) a general discussion of the annual financial statement. The Indian Councils Act of 1909 extended the right of interpellation by allowing the putting of supplemen-

Power of in-  
terpellation  
given by  
later sta-  
tutes and  
power to pass  
resolutions.

tary questions, and authorised members of the Council to move resolutions on the financial statements presented to the Councils, as also on matters of general public interest at meetings of the Legislative Councils. The rules framed under the Act in this behalf are not liable to alteration by the Legislative Councils, and these rules as framed permit the putting of supplementary questions for the purpose only of eliciting information (a), and enable members of the Councils to pass resolutions which operate only as recommendations which the Government may accept or reject.

Importance of administrative control to supply what is wanting in the others.

29. The foregoing examination of what I have called the Parliamentary or legislative control of the administration makes it obvious that, at its best, this form of control (even when re-inforced by all the available control exerciseable by the law courts) fall short of keeping the administration to its duties in the matter both of efficiency and of the respect that is due by it to private rights. What is wanting in these forms of control must be made good by administrative or departmental control, which means control by the higher over the subordinate authorities in the administration. "It is," as Mr. Goodnow correctly says, "a sort of *self-control* and its extent depends altogether upon the degree of administrative

Administrative control best developed in Germany.

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(a) Mr. Iyengar, whose treatment of the subject in his book on the Indian Constitution is the most satisfactory I have found, notes the difference in principle which governs the practice of the British Parliament and the Legislative Councils of India respectively in the matter of interpellations. The English practice is based on the principle that it is imperative that the Parliament shall be duly informed of everything that may be necessary to explain the policy and proceedings of Government of any part of the Empire, and the fullest information is communicated by Government to both Houses from time to time upon all matters of public interest, such information being withheld only when the public interests will suffer by the disclosure. But the powers of interpellation given to members of the Councils in India proceed on the reverse principle, that the Government is not bound to give any information except such as it deems necessary to give in the public interest. It could hardly be otherwise considering the position of subordination to the Executive Government held by the legislatures in India. Iyengar, *Indian Constitution*, p. 189. The Montague-Chelmsford Report to Parliament on Indian Constitutional Reform has proposed that any member of the Supreme or a Local legislature (and not merely he who put the main question) may ask supplementary questions. The Government cannot disallow a question on the ground that it cannot be answered consistently with the public interest, but will have power to disallow a question on the ground that the putting of it is inconsistent with the public interest. See paras. 236, 286.

centralisation present in the administrative system" (a). This "self-control", I have previously indicated, is best exercised in Germany—so well indeed that in many matters it stands for what in other countries is attainable by judicial and legislative control. The reason of course is, as was pointed out before, that the German bureaucracy is kept thoroughly in hand by the central authorities. Absence of centralised control of the services, I have pointed out more than once, leads not merely to inefficient but also to oppressive administration. Of the inefficiency of the decentralised administrations of the States of the American Union I have spoken in a previous lecture. The administration in these States is prevented from being oppressive only by the fact that the higher officials there hold under temporary elective tenures. It is in countries not possessing representative institutions that the evils of uncontrolled officialism make themselves grievously felt. The Federal Government of the United States is better and more efficient than the State Governments for the simple reason that the National Administration is also more centralised. The progress of centralisation in the English administration since 1834 has, as observed before, been distinctly in the direction of better administration. The control, it should be remembered, is not limited entirely to subordinate officers of the administration. It extends to some extent (more in some countries than in others) to autonomous local corporations as well. In so far as centralisation of administration means (and it does mean) officialism, the progress of this element in the administration is, I need hardly repeat, inevitable. But it has, I believe, been also made clear that this is by no means inconsistent either with local or with personal autonomy. The problem of reconciling a strong centralised administration with local and personal autonomy is the problem which modern administrative law has set itself to solve. The State and the individual, I repeat once more, are the two factors of the administration. Neither can be eliminated without condemning the other to futility. Both must grow together by mutual interaction (call it conflict if you like) in strength, stature and moral grandeur.

Weakest in the States of the American Union.

Federal Government of the United States more centralised.

Progress of centralisation in England.

Centralised officialism inevitable in modern conditions.

But is not inconsistent with personal and local autonomy.

(a) Goodnow, *Comparative Administrative Law*, Vol. II, p. 140.



## L'ENVOI.

Wide extent  
of the subject  
of the lec-  
tures.

1. I have now concluded my survey of what to me has been a subject of absorbing interest. It has covered grounds so extensive that I have experienced the greatest difficulty in keeping my treatment of it within manageable limits. And yet I feel that I have not been able to do more than barely touch upon the fringes of a variety of topics which need closer and more extensive examination.

Its practical  
interest for  
all men.

2. Those who have followed these lectures cannot have failed to remark that the interest of the subject is an intensely practical one. Nor is that interest one confined to persons of exclusive tastes and occupations. If there is one conviction more than any other which a study of modern administrative forms forces on one's mind, it is that administration to-day is no longer the business of Kings and rulers only. At all times in history it has been a matter deeply concerning the whole community, but only within the last hundred years has it been realised that it needs for its success the willing and conscious co-operation of the whole population. But even more forcibly is one made to feel that, as years go by, the success of any system of administration must depend in increasing measures upon the organised labour of experts. That there is a certain amount of opposition between the two necessities must be plain to the most superficial observer. To eliminate the expert is to court anarchy. To hand over the administration entirely to experts leads only indirectly to the same end. Even if all differences upon the ultimate goal of governments should vanish, even if all class conflicts, class jealousies, and sectional selfishness and greed should finally disappear, there would still remain the difficult problem of reconciling the methods of the expert with the point of view of the layman, the outlook of the official with the sympathies of the non-official, the claims of efficiency with the no less insistent demands of flesh-and-blood humanity. The law—administrative law—is the means by which the conflicting interests of the ruler and the ruled have been sought to be reconciled and, so far as one can judge, with a considerable measure of success, in an age in which the ultimate identity of interest between them has been but faintly realised.

All persons  
must cons-  
ciously co-  
operate in  
the work of  
administra-  
tion which  
yet must be  
carried on  
increasingly  
by experts.

Whilst that opposition is showing signs of disappearing, it is making room for the newer opposition just foreshadowed between the layman and the expert. I see no reason for doubting that in the situation which is about to develop, the same instrument, administrative law, will be found ready to adapt itself for the performance of its mission of reconciliation between the layman and the expert. I am not so foolish however as to expect that victory will be achieved by law alone. The law must be moulded and worked by moral forces operating from behind and within it (a).

To mediate between them is the future mission of administrative law.

3. If these forces do not fail it, administrative law may be the means for accomplishing a good deal more than the mere reconciliation of conflicts between ruler and ruled, between the layman and the expert. These forces will overstep the limits of State boundaries and communal interests. They will humanise international dealings. An eminent French writer has recently pointed out the close relation which exists between a State's conception of its relations towards its subjects and its ideas of international obligations. A State which recognises no obligations of law in its dealings with its own citizens can have very little respect for rules of international morality in its dealings with foreign States or subjects. The ruling German theory of the relation of the State towards citizens was well-expressed by Jhering in a passage in which he stated that "if the extraordinary situation arose in which the State with its power found itself under the obligation, in the alternative, of sacrificing either law or society, it would not only be authorised, but obliged to sacrifice law and to conserve society." Public law, according to German jurists, is law only by self-limitation. Whatever may be its cultural value, it can have no ultimate binding authority upon the State which always remains the judge of when and how far it will follow or disregard it. Consistently with this

How a theory of administrative law reacts on the State's relations with other States.

German juristic doctrine of auto-limitation of the State's powers and its bearing upon Public and International law.

(a) A whole chapter might be written upon this text. "Eternal vigilance" said Jefferson, one of the first founders of democracy in the modern sense, "is the price of freedom." "Indifference," says Mr. Elihu Root, "is the deadliest enemy of democracy." Democracy as a polity can in modern conditions succeed only upon condition that the rulers who are also the ruled, that is to say, the people go seriously to school in civics, a science which, in democratic countries, is fortunately receiving increasing attention as a subject of popular study.

view of the nature of public law, the German jurist prophet of the doctrine of auto-limitation, Jellinek, propounds this characteristically German specimen of international morality: "Whenever upon investigation international law is found to be in conflict with the existence of the State, the rule of law retires to the background, *because the State is put higher than any rule of law*, as the study of the relations of internal public law has already taught us" (a). The cynical disregard by Germany of all rules of international morality in the world war just concluded was, according to M. Duguit, the logical outcome of the vicious doctrine of auto-limitation prevalent in the public law of the "Fatherland."

Other Ideals,

4. The mention of the war suggests other ideals to which fitting reference can be made in this epilogue. The President of the United States, Mr. Woodrow Wilson, upon the entrance of the Great American Republic into the war in the interest of the allied democracies, said: "We are about to accept the gage of battle with this natural foe to liberty, and shall, if necessary, spend the whole force of the nation to check and nullify its pretensions and its power. We are but one of the champions of the rights of mankind. A steadfast concert for peace can never be maintained except by a partnership of democratic nations. It must be a league of honour, a partnership of opinion. The world must be made safe for democracy". It is to President Wilson again and to the war that the world owes the clearest enunciation ever yet made of the principle of the inherent right of self-determination belonging to all communities. The British Empire not being in every part democratic, this principle of self-determination recently found expression, with reference to India (that largest part of the Empire which is still governed by undemocratic methods), in the announcement recently made by the Secretary of State for India in the House of Commons promising responsible government to India—a promise which, faithfully fulfilled, will virtually abolish that division of the Empire into a "sphere of settlement" (carrying with it as of course full British citizenship) and another and inferior "sphere of autocracy and rule,"

Autocracy vs  
Democracy.

Inherent  
right of self-  
determina-  
tion of com-  
munities.

Promise of  
responsible  
government  
to India—its  
significance.

(a) M. Leon Duguit, "The Law and the State," 81 Harvard Law Review, Nov. 1917, pp. 120, 142.

which Sir C. P. Lucas, so recently as 1912, seemed to regard as a part of the immutable order of nature (a).

5. These, however, are ideals long implicit in democracy, now brought for the first time to the surface by the working of the war. But the war will have equally important consequences in shaping and influencing, not the ideals only, but the actual methods of government. In order that they may be able to fight autocracy with his own weapons, the democratic nations of the world were driven to organise themselves temporarily into autocracies. They were forced to accept responsibilities and assume powers which, if left to evolve their methods by the slow processes of peace, they would have hesitated to take on themselves for long centuries to come. To this necessity the people of these countries, for their part, have dutifully bowed. With the advent of peace the autocratic powers assumed from necessity will without doubt be laid down, but the responsibilities will remain, and the conflict

Possible effect of the war on the methods of government in democratic countries.

(a) Sir C. P. Lucas, *Greater Rome and Greater Britain*, Clarendon Press, 1912, pp. 142-143. Since the above was written the Secretary of State for India and the Viceroy have submitted to Parliament their joint proposals for constitutional reform in India, which are intended to give practical effect to the pronouncement of 20th August 1917 referred to in the text. The terms of the pronouncement were as follows:—"The policy of His Majesty's Government, with which the Government of India are in complete accord, is that of the increasing association of Indians in every branch of the administration, and the gradual development of self-governing institutions with a view to the progressive realisation of responsible government in India as an integral part of the British Empire. They have decided that substantial steps in this direction shall be taken as soon as possible and that it is of the highest importance as a preliminary to considering what these steps should be, that there should be a free and informal exchange of opinion between those in authority at home and in India. His Majesty's Government have accordingly decided, with His Majesty's approval, that I should accept the Viceroy's invitation to proceed to India to discuss these matters with the Viceroy and the Government of India, to consider with the Viceroy the views of Local Governments, and to receive with him the suggestions of representative bodies and others.

"I would add that progress in this policy can only be achieved by successive stages. The British Government and the Government of India on whom the responsibility lies for the welfare and advancement of the Indian peoples, must be judges of the time and measure of each advance, and they must be guided by the co-operation received from those upon whom new opportunities of service will thus be conferred, and by the extent to which it is found that confidence can be reposed in their sense of responsibility.

"Ample opportunity will be afforded for public discussion of the proposals, which will be submitted in due course to Parliament."

## L'ENVOI.

previously foreshadowed between laymen and officials will be precipitated. That conflict will have to be faced and solved and both laymen and experts must be taught to co-operate for the realisation of the commonly conceived purposes of the administration. This co-operation between officials and citizens which had preceded the war in Germany will come after it amongst the nations which until the other day were fighting the battles of freedom. And it is well that this should be so, for by the time when this co-operation does arrive in those countries, the lessons of the war will have been learned so well as to make it impossible for it to be turned to the ignoble uses to which it was being put in Germany viz :—to rob and despoil other nations and other countries. (a)

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(a) Amongst the objects of the war enunciated by President Wilson in an address delivered on July 14, 1918, at the tomb of Washington, Mount Vernon, U. S. A., (before the representatives of thirty-three nations and peoples allied to oppose the Teutonic powers) was the following : "The settlement of every question whether of territory, of sovereignty, of economic arrangement or of political relationship upon the basis of the free acceptance of that settlement by the people immediately concerned and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery".

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